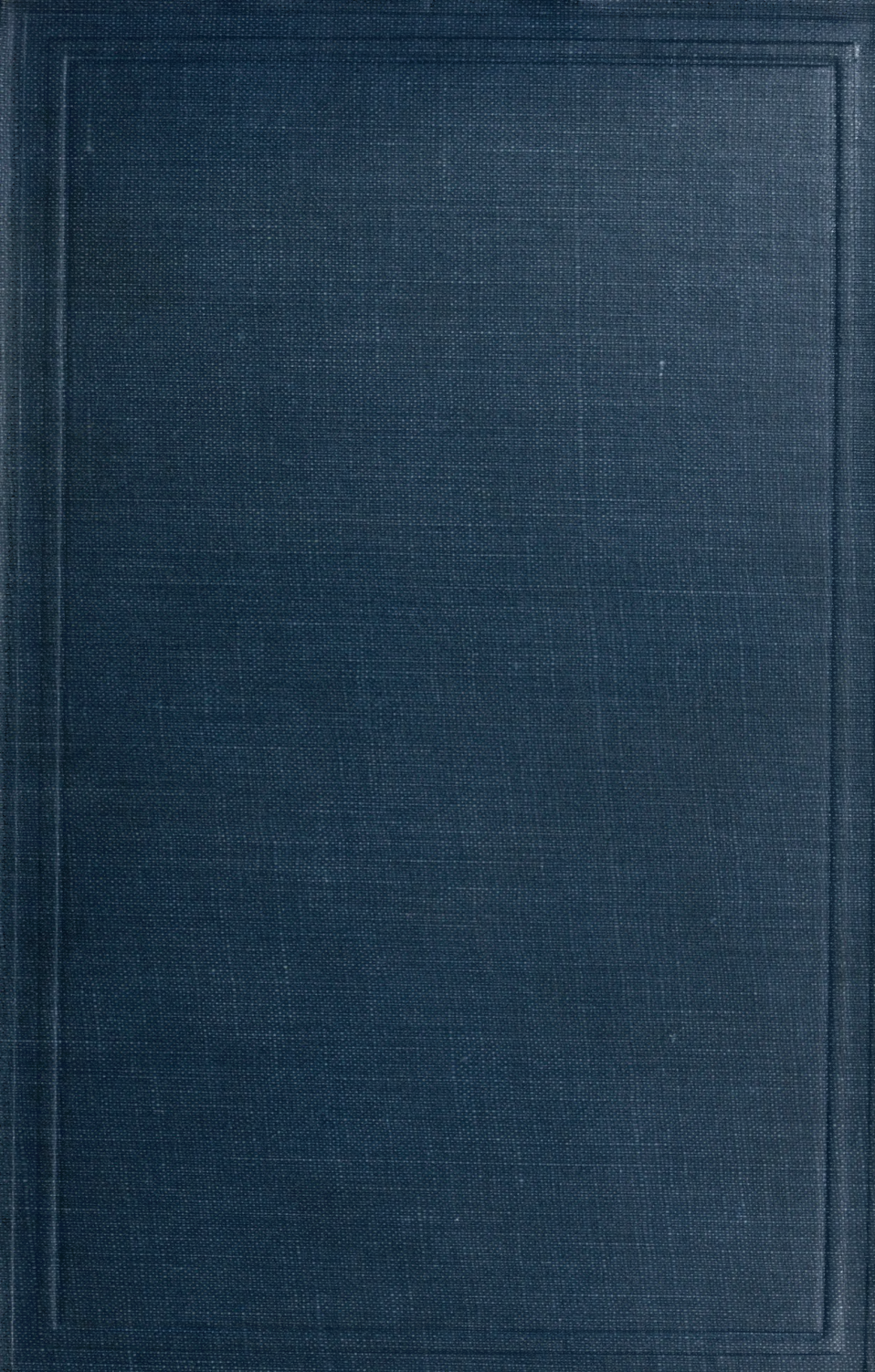




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THE CORPORATE NATURE
OF
ENGLISH SOVEREIGNTY

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THE AUTHOR IN HIS RESEARCHES

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THE
CORPORATE NATURE
OF
ENGLISH SOVEREIGNTY

A DISSERTATION

BY
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*(Submitted to and accepted by the University of Cambridge as a Work of Original
Research for the Degree of Bachelor of Arts)*

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INTRODUCTION

THIS dissertation upon the nature of English Sovereignty is an offshoot from a work upon Crown Law upon which the author has been engaged for some years past.

In endeavouring accurately to ascertain and clearly to define the legal entity of the nation for the purpose of the latter work, he soon became involved in intricate reflections as to the true nature and *personnel* of the National Executive, and consequently turned to investigate this latter question. The search has led him to a number of conclusions, some of which are obvious and generally accepted, and some not. The former he does not, of course, claim to have originated, and the latter he does not claim to have conclusively proved. These conclusions may be formulated somewhat as follows :—

(1) English Sovereignty, elementally, is triune, comprising the creative, the administrative, and the executive functions. (2) Each of these functions is and has always been a plural or co-operative function, *i.e.*, exercised by more

than one person. (3) The Executive is and always has been more ubiquitous and more extensive than either the "Crown" or the "King." Though nominally called a royal function, it has always been more extensive than the powers of the sovereign. (4) The term the "Executive" is sufficient to comprehend the entire legal entity or the legal status of the nation, whilst such expressions as the "Crown" and the "King" represent aspects or parts of the latter merely. (5) The "Crown" has always had a wider range of authority than the "King"; it has always included other officers than the King. The irregular manner in which the above terms have been employed in legislative and judicial records has produced irretrievable consequences, and it is now impossible to attribute any definite and exclusive meaning to either of these names. The conventional notions are that the expressions "the King," "the Crown," and "the Executive" are synonymous. These *obiter dicta* even pass under the guise of Rules. They are theories, but are not, and never have been, actual facts.

The correct name for the National Executive is the "Executive"; for the National Administration, the "Executive in Council"; for the National Creative Function, *i.e.*, the legislature, the "Executive in Parliament." In practice, formerly, the word "King" was used in place of "Executive,"

and, latterly, the word "Crown," which is a more impressive word than "Executive," and one that will probably remain in use.

Sir Francis Palgrave has suggested that the Constitution has been constructed upon the early coronation oath. It would be more reasonable to say that the coronation oath represented the constitutional position of the King in those early times, and that the nation has succeeded, after protracted struggles, in sustaining in practice its supremacy in the constitution and in keeping the King in his true place as principal executive officer. Sir Frederick Pollock and the late Professor Maitland have assured us that the farther back we go into Anglo-Saxon legal history the bigger is the place occupied by chattels in the eye of the law, and that real property law in the twelfth and thirteenth centuries practically overlaid the law relating to chattels. We see the same thing in studying the history of the constitution. The Romans in the twelfth and thirteenth centuries attempted to overlay the Saxon constitution with "Cæsarian despotism."

The Roman lawyer found a natural and spontaneous body politic in England with a Chief Magistrate to carry out the more important expressions of national will. He examined the position, rights, and obligations of the post, and proceeded to formulate. The situation refused to be

formalised. The more determined the effort to formulate, the more inaccurate became the results. The Anglo-Saxon practices, ideas, and temper refused either to be re-made or suppressed. The attitude of the Roman ecclesiastic-lawyer towards Anglo-Saxon ideals and customs is accurately described by Blackstone. (*See Bla. Com.* (1765), vol. i., pp. 17 to 21.)

In his unique and masterly fashion Maitland has already touched upon this question of Sovereign nomenclature. (*See* 17 L. Q. R. 131.)

When this dissertation was commenced the author laboured under the orthodox but erroneous impression that the King was and had been from early Anglo-Saxon times the real head of the State and the fountain of all jurisdiction. He assumed that the older constitutional rights of the Great Men and the Freeholders of the nation had been effectively subordinated to the Monarchy, and that the present claims of the national Crown, and, *a fortiori*, the Executive, to recognition as a substantive function arose in comparatively recent times.

A study of our legal history, however, has suggested that these exalted claims put forward on behalf of the Monarchy were made chiefly by the monarchs themselves, supported by the Roman *Curia* and its obedient agents in England. They

emanated not from the people, nor from the constitution, but from gratuitous theory tendered by Roman ecclesiastics, which tended rather to strengthen homogeneity and to create the trappings of office. Powers and rights which were ascribed to the King belonged to a more comprehensive and a more representative authority. The right of the Great Men and the Landowners to participate in the functions of government, though belittled by theorists, appears to have enjoyed a continuous though chequered existence.

The nation appears to have possessed and to have retained continuously a quasi-corporate existence from early times. The King was at first a prominent official, and nothing more, subordinate to the Assembly of the Great Men, of which he was nevertheless a member, and subordinate also to the political *personnel* of the nation. His office, owing to the influence which he exerted in council, and also to the fact that he attended deliberations as the official representative of the Executive, grew in importance. Theory was all that was needful to decorate, and to give it an air of despotism.

The author desires to express his great indebtedness to Sir Frederick Pollock for advice and assistance given upon various matters, also to Sir William Anson and Professor Vinogradoff for

their letters, and to a member of Trinity College, Cambridge, for his discussions with the author upon Professor Ridgeway's theories in the domain of Anthropology.

All the references have more than once been carefully verified, and it is hoped that in the course of the transcriptions which have been made no errors may have crept in.

THE CORPORATE NATURE OF ENGLISH SOVEREIGNTY

CHAPTER I.

GENERAL

IN CONSIDERING the nature of English Sovereignty it is necessary to discuss the question whether the Monarch has ever ruled alone, with the sanction of the constitution, either in deliberative work—*i.e.*, in legislation or administration—or in executive work.

There are certain general reasons for suspecting that the Kingship was a contributory and not a sole function of Government.

The first is the divergent political views which have been held as to the King's powers. At every stage in history there have been two main streams of opinion regarding them.

On the one hand, in Germany, the King was the accredited descendant of the gods like the ancient Greek kings, an ideal associated with his prowess, unlike the ideas of the Roman civilians and ecclesiastics, according to whom the claims arose merely from tenure of an accredited office. Even at the present time the Kaiser claims to rule by Divine right. In England in the ninth and tenth centuries the King adopted exalted titles. In the twelfth century Glanville appropriated to him the

lex regia. In the sixteenth century the English ecclesiastics ascribed to Elizabeth a reversion of supreme authority capable of overriding the power of Parliament, and in the following century reference is made to the sacred *ordo*, and to Kingship by Divine right.

On the other hand we perceive the King as a much more modest personality. He was merely a feudal chief; his subjects might dissolve the relationship and make war upon him. This idea remained till after the Statute of Treasons, 1350,¹ though Guizot doubts whether it could be done easily after the feudal relationship became associated with the tenure of land. He is 'under the law.' He is nothing and the office is everything; even this was urged, but denied. His officers are criticised. He dismisses them, and finds it prudent to reinstate them to allay dissatisfaction. His personal friends—men and women—are objected to, and he is required to send them away; frequently he complies. He is subordinate to the *Universitas regni*; in short, the King is given for the benefit of the laws, and not the laws for the benefit of the King.

This matter may be noticed from another point of view, and his nomenclature and attributes may be reviewed. The King has been variously regarded as—(1) Chief; (2) Bretwalda (head chief); (3) Mundbora (guardian or protector); (4) Feudal Superior (a domestic relationship); (5) Head of a political society after the feudal system waned, which occurred by the end of the thirteenth century; (6) *Rex politicus*, or constitutional monarch (the Lancastrian notion expanded by Fortescue); (7) Intensified man—Professor Maitland's 'crystal,' applicable rather to his privileged status as a subject of law than to his constitutional position; (8) *De facto* King,² a statutory tenure; (9) Corporation sole (Legal theory);³ (10) Head of Mystical

¹ Holdsworth, iii., 251; P. & M., ii., 503, 5.

² Henry VII. c. i.

³ See Maitland hereon, 17 L. Q. R. 131.

Body¹ (Legal philosophy); (11) Representative of a sacred *Ordo* (Ecclesiastical philosophy);² (12) Impersonal King (modern tendency); (13) Heathen Kingship (Queen Anne as "Medicine Man");³ (14) *Pater Patriæ*; (15) *Medicus Regni*;⁴ (16) the Child of his People (Freeman).

We have also to bear in mind the somewhat inchoate state of the whole constitution in early times. Sir Matthew Hale declared that he was unable to understand the form of government anterior to Henry III.⁵

This question was much discussed in Hampden's case, where it was contended by Oliver St. John, the leading counsel for Hampden, that the royal prerogatives all stood upon uncertainties until the reign of Edward I. The Statute *De Prerogativa Regis* (17 Ed. II.) did much to confirm some, and to determine and, possibly, to confer others. Holborne, Hampden's junior counsel, said with considerable justification that the government in those early times was more by force than by law. Indeed, the rules of law and customary practices, the *matériel* and the *personnel* available for the construction of the England that was to be, were both profuse and heterogeneous.

There was a superfluity of material, gathered from numerous systems and practices, from which selections were to be made. This produced a sort of constitutional *mêlée* in which the King, the Church, the *Great Men*, the Tax-payers, and *Practice and Theory* all sought to come by their own. Vagueness certainly existed in regard to public law, but the early status of the King was rendered quite as uncertain thereby as the rights of the Church, the Nobles, and the Freeholders. In particular it must be borne in mind that the exotic theories of Kingship, which the Roman lawyers endeavoured to transplant from their own country, did not determine the true juristic position of the King.

¹ See Plowden, 232, and 25 Henry VIII. c. 22.

² See the Church Canons, 1606.

³ See Frazer, *History of Kingship*, 126.

⁴ 11 Co. Rep., 70b.

⁵ See Fortescue, *De Laudibus Legum Angliæ*, 57.

No early claim that was not indigenous could be passed unless it received general acceptance or ceased to be met with substantial opposition. On the other hand, historical custom might be treated as established law.

If, as Holborne declared, law was reinforced by government, it was no less within the polity of the times to employ crude force to emphasize the wishes of discontented majorities. The lawyers used the pen and the nobles sometimes used the sword to determine disputed points, and neither weapon can be ruled entirely out of our consideration of mediæval English history.

A few instances will be useful to enable the reader to appreciate the uncertain status of the King and the variable part played by him in public acts.

The peace of God (*i.e.*, of the Church) was sometimes placed before the peace of the King. The penalties for stealing from the Church or the Bishop were, by the Doms of Aethelbirht, more severe than for stealing from the King, who was placed in this respect on a level with the priest.¹

The peace between Alfred and Guthrum was made with the consent of the Witan and all the peoples of East Anglia.² Sometimes the Witan ordained without the King.³ In numerous cases the King ordained with, and, in some cases without, the Witan. In many cases the King "established" (*an executive act*) law with the Witan. Sometimes he did so without them. In one case he decreed with the Witan (*an act of quasi-judicial nature*). The word "we" is clearly used with the plural meaning (King and Witan) by Eadmund.⁴ On other occasions it appears to have been used officially by the King alone.⁵ Sometimes the King ordained with *Counsel*.⁶ Sometimes the King and Witan ordained jointly.⁷

¹ Thorpe, i.

² *Ibid.* 66.

³ *Ibid.* 133.

⁴ Liebermann, 187.

⁵ See Thorpe, 68.

⁶ *Ibid.* 111.

⁷ *Ibid.* 145.

A very composite authority was responsible for a piece of legislation passed in the reign of King Ine.

*"Ego Inae, Dei gratia West Saxonum rex, exortatione et doctrina Cenredes patris mei et Heddes episcopi mei et Erkenwoldes episcopi mei et omnium aldermanorum meorum et Seniorum sapientum regni mei multaque congregatione sevorum Dei, Sollicitus De salute animarum nostrarum et Statu regni nostri (mei) constitui rectum conjugium et recta (justa) judicia pro stabilitate et confirmatione populi mei benigna sedulitate celebrari, et nulli aldermanno vel alicui de toto regimine nostro conscripta liceat obolere judicia."*¹

The utmost good feeling must have prevailed everywhere throughout the nation at that particular moment, for everyone, from the King to the populace, participated in that effort.

In Edward² we find "I command" and "We ordain." The executive or declaratory act is the King's, but the legislative (*scil.*, administrative) act is co-operative. The King referred the question of public safety to the Witan, and³ asked for volunteers to assist him in executing his former commands.

With the introduction of the expression "Crown" in the reign of William I., the Executive status was more accurately defined, but William and also many of his successors ordained and established law in an irregular manner.

The position of the Church was far from clear in the time of Henry II., for that king in the course of his controversy with Becket told the King of France that there had been many Kings of England, some of greater, some of less authority than himself.⁴ He then said, "Let Becket

¹ Liebermann, 89.

² *Ibid.* 139.

³ *Ibid.* p. 141.

⁴ Campbell, *Lives of Chancellors*, i., 89.

act towards me with the same submission which the greatest of his predecessors have paid to the least of mine, and there shall be no controversy between us."

As late as Edward II. the deposition of the King was declared to be justifiable upon, *inter alia*, the following grounds, namely, that the King was not competent to govern, and did not attend to his duties, and did not have good counsellors.¹

These are but a few instances. Others come to light as the kingly activities in the various State functions are considered more in detail.

The King was sometimes allowed a supreme or exalted status for a particular purpose, and with a particular end in view. He was not infrequently made the champion of the nation against some foreign power which claimed to exert authority over England. In such cases this concession to the kingly status must be read in the light of the particular circumstances and not as a general proposition. In the reign of Henry VIII. the King, being the protagonist of the nation, was often exalted solely in view of the dispute which he maintained with the Papacy, and some of the official statements which were made in his reign must be read in the light of that circumstance.

The immense lead which the dispute with Rome gave to the King over the rest of the community made the period in question an exceptional one. It is not altogether surprising, therefore, to read in 27 Henry VIII. c. 26 such a declaration as the following :—

" As (Wales) is under the temporal crown of this realm, and very member and joint of the same, whereof the King's most Royal Majesty, of mere right and very right in very head King Lord and Ruler," etc. King Henry was a strong-minded individual, but he was also at that time

¹ Stubbs, C. H., ii., 379.

occupying an "emergency" position. On the other hand, although the same question was agitating the State in the reign of Richard II., it was not the monarch who was exalted, but it was the "Crown" of England which was alleged to be free.¹ Then, too, exceptional periods of history such as the Conquest, or the various internecine struggles, not only put the King in possession of great power but even justified its exercise as a temporary expedient.

Researches into the limits of constitutional authority are not aided by the fact that no rule is ever propounded in strict accordance with fact. Practice and theory must diverge to some extent. Small discrepancies must be passed over, but substantial differences compel suspicion and incredulity. Pronounced discrepancies existed in early and mediæval times between the reputed and the actual functions of the King. This is, however, a trifling difficulty compared with a further inevitable one created by the fact that constitutional rules are necessarily declared in general terms, without the requisite qualifications or limitations which they impose upon one another. This necessarily left many uncertainties in the constitution, which the body politic has had to adjudicate upon when the occasion demanded.

The possession of Normandy by the English Kings, until the time of John was an element which increased in a most unconstitutional manner the amount of physical force which the King was able to bring to bear upon the political controversies of the age. Moreover, not until the loss of Normandy to Philip did the barons settle down as Englishmen. This cleared the ground for a fair trial of strength between the King and the forces of the nation.

A further argument is to be found in the fact that the Kingship is now and always was *limited*. That fact

¹ Rolls of Parl., iii., 305 (20).

is admitted on all hands. *A priori*, the fact that the power of any State function is limited necessarily involves the existence of supplementary authority, for the power of every political community is absolute within its own borders. *Ergo*, what the King cannot do can be done by others. These supplementary powers are to be found not only in the realm of legislation, but also in administrative and executive activities.

We must not expect to find in the law books many English legal theories much before the time of Fortescue, who may perhaps be considered as our first philosophical jurist. Laws and rules of law existed, and were collected by Bracton, who also incorporated a great deal of undigested legal theory. As an English lawyer Bracton was splendid, but his theory was not always consistent, for the King could not be the Vicar of God in any special and exalted sense¹ or as Jesus Christ,² and at the same time be subject to the laws of men: "*Attribuit igitur rex legi quid lex attribuit ei, videlicet dominationem et potestatem, non est enim rex ubi dominatur voluntas et non lex.*"³ The Divine Will is perfect; the laws of England were imperfect and controlled the King. Neither as the Vicar of God could he be said to have "associates"⁴ whose office it was to correct him when he acted contrary to the laws. The English law in Bracton was *fait accompli*. The theory was largely matter for contemplation by future generations, to be by them either transmuted into law or rejected.

In reading this very learned writer, one cannot resist the suspicion that he was not easy in his mind when he introduced some of the fanciful notions of the ecclesiastical lawyers. It was morally impossible for him to omit them, for legal opinion in England was then saturated and obsessed with the clerical point of view. At the same time,

¹ Rolls of Parl., Bk. iil., ch. 9, s. 3.

² Bk. i., ch. 8, s. 5.

³ *Ibid.*

⁴ Professor Vinogradoff doubts whether Bracton is really to be held responsible for the dual nature of the sentiments attributed to him (L. Q. R. i., 199).

one cannot fail to discern here and there uncompromising statements of English practice, Coke-like in their bluntness and incisiveness, which traverse Roman theory. Until the thirteenth century, therefore, we can only be expected to place absolute reliance upon laws. These prove what they allege. Theory must justify itself, and this it can only do when it has been transmuted into definite law or established practice.

CHAPTER II.

—
THE NATURE OF ENGLISH
SOVEREIGNTY

BEFORE setting forth briefly some of the evidence of corporate sovereignty it is necessary to obtain a notion of what is here meant by "sovereignty." Its corporate character must also be shown briefly.

By "sovereignty" is meant the ruling authority. It is constantly stated that the only approved forms of government are the monarchy, the aristocracy, and the democracy; or a government compounded of two or more of these. These are the three primary political complexions which a government may assume, but the redistribution of political power which has occurred in England has shown that a State may contain more than these three factors.

In the English constitution the State powers enjoying initiatory functions are seven in number.¹ In a state of coalescence there are (1) a Monarchy; (2) an Autocracy, *i.e.*, the Prime Minister; (3) an Oligarchy, *i.e.*, the Cabinet; (4) an Aristocracy (the lords of Parliament); (5) a Bureaucracy, *i.e.*, the Controllers of Departments; (6) a Judiciary; (7) a Democracy. Each contributes something of value. Each is kept in its place by the others. The Democracy possesses a two-fold status, that of the individual and that of the community as a collective society. The former

¹ It is not suggested that the principles upon which the *personnel* of these functions is determined are incapable of improvement.

exercises, politically, the franchise, and, personally, administrative and executive powers, such as recaption, replevin, distress, self-defence, and comes into evidence in Relator proceedings; and the latter dictates the policy of the country by its choice of a political party, and its mandate upon political issues.

The Democracy is the only original, spontaneous, and creative power from which all other functions have emanated by express creation or sufferance. By its action it has made the common law, and still continues to develop custom.¹ It passed the 'Act' of Salisbury, 1086. It spoke through its agents to Edward II. and Richard II. It acted again in 1642. It spoke once more in 1660, and again acted in 1689. Of sovereign functions it retains a little, of sovereign mandate much, but of sovereign might the whole.

This seven-fold sovereignty, with its manifold representation, is capable of exercising absolute authority, and is not open to the same criticism as the conception of sovereignty entertained by Austin, who expected to find all the essentials of absolute authority in partial functions.

The reality of the Bureaucratic power may perhaps best be illustrated by repeating the picturesque, if exaggerated, statement made by Lord Rosebery on 5th June, 1909, at the Imperial Press banquet. His lordship, after suggesting that Parliament should grant two years' supplies, and then make a tour of the Colonies, says with confidence that the country in the interim would be governed much as it is now, 'by the permanent heads of departments,' and, his lordship continues, 'I am sure that some of us would feel even greater confidence in the welfare of the country if it were under that permanent and well-ordered control.'²

¹ See *Bechuanaland Exploration Co. v. London Trading Co.* [1898] 2 Q. B. 658; *Edelstein v. Schuler*, [1902] 2 K.B. 144; *Williams Real Property*, [1906] p. 477; *Wensleydale Peerage Case*, 5 H. L. C., per Lord Brougham, at p. 969.

² *Times* newspaper, June 7th, 1909.

Reference might also be made to the part which the departments take in preparing the estimates, in drafting statutes, provisional orders, statutory regulations, and in approving by-laws. All these, it is conceived, entitle the Bureaucracy to be considered an elemental and essential State factor. The Judiciary, too, has played an important part in the government of the country. Notable instances of individuals who were in effect law-givers are Cardinal Wolsey, Lords Nottingham, Eldon, and Mansfield. *Taltarum's Case*¹ was, in effect, a partial repeal of the statute *De Donis Conditionalibus*. The rule in *Shelley's Case* was an arbitrary rule of construction laid down for general convenience which is, in effect, a rule of law. The decision under the Statute of Uses that a trust in which the trustee had active duties should not be executed by the statute was a most important rule of law.² All judicial definitions are, in effect, rules of law.

Such is the sovereignty in England at the present time. In earlier times its functions were not so divisible, nor was its *personnel* so numerous, but, whatever the factors of government may have been at any particular period, it is here suggested that they have always supplemented the delegated functions of the King with functions reposed in others.

The three leading functions of all government are the creative, the discretionary, and the executive. The first makes new rules. The second interprets and organises, takes what the creative has provided, and turns it into a workable scheme. The executive is impressed with authority and endowed with power. It carries out the scheme, and at the same time is fully identified with all the functions of government.

¹ Really *Taltarum* according to Maitland (L. Q. R. ix., 1), or *Talkarne* (G. J. Turner, L. Q. R. xii., 301).

² See 1 Eq. Cas. Ab. 383a.

In each of these three juristic functions the King played a part in mediæval times, the extent of that part varying, it is interesting to note, in inverse proportion to the importance of the function. In the creative his power has always been strictly limited. In the discretionary or administrative, such as the making of State regulations, concurrence was required, but the King played a relatively larger part, for the King's Council, being a small body of men who met in his presence, and deliberated under his notice, came unduly under the influence of his personality and power. In these two functions it is suggested that co-operation was always concurrent and conjoint. The King was never entitled to act alone. He could never free himself from the obligation to share the duties, in the former case with the nation, and in the latter with the Great Men of the realm.

Executive work, in practice, is of two kinds—(1) control, (2) performance. Although the King was essentially the executive officer of the realm, there were many instances in which the duty to originate proved inseparable from the duty to perform. Hence the Councils were often drawn into much Executive work, and much deliberative work fell upon the shoulders of Executive officers. Whether the King acted alone or with his Council depended probably upon the question whether the act was mainly discretionary or mainly ministerial.

In regard to matters purely ministerial the co-operation was several and not joint. Some acts were properly performed by the King or under his sole authority. Others were performed by officers appointed, sometimes by the King in Council, and, in other cases, by the King as the agent of the executive, acting under directions made by Council or Parliament.

An officer (*e.g.*, a sheriff) whose duties were prescribed by administrative order or legislation (*i.e.*, by Council or Parliament) exercised State and not royal functions. The

King was merely his official overseer. Even the rule that such an officer may have been appointed and was dismissable by the King does not nullify the relation which he bore to the body which prescribed or varied the main functions of his office. The King might see that he performed his executive duties, but was entitled neither to vary them nor to excuse or impede their due execution. The King can only prescribe what the law prescribes. The command of the King cannot excuse a wrong.¹ In other words such an officer was *pro tanto* a substantive State official as veritably as was the King himself. The officer might still be known as an officer of the King, but he might be called to account by the King, by Council, or by Parliament.

In a correspondence which the author had the privilege of carrying on recently with Sir William Anson, the latter makes the following important declaration upon the subject of English Sovereignty, which, it will be noted, includes the executive function.

“ If,” said Sir William Anson, “ by co-operative sovereignty you mean that according to the Theory of the Constitution the King never acts, and never has acted alone, I think that what you are asserting is a commonplace in constitutional history. But,” he continued, “ I think also that anyone who propounded this theory to William I. or Henry II. would have found his constitutional studies cut very short. Henry VIII. would probably have shown him that there were constitutional methods of enforcing the King’s personal inclinations, and if he had suggested to William III. that he had better follow the lines of the constitution in his dealings with our foreign relations, I think that contemptuous disregard would have been all that befel him.”

The author respectfully desires to offer one or two observations upon this statement. In the first place, as has been

¹ *Feather v. R.*, [1865] 6 B. & S. 257. See hereon generally, Robertson, *Crown Practice* 638 *seq.*, and Clode, *Petition of Right* ch. 7.

already indicated, some executive acts were, at least until quite modern times, proper to the King, and would be performed by himself and by his agents, without the intervention of anyone, *e.g.*, appointment of officers, certain directions to the Chancellor, the authentication of many acts of State, the assent to legislation, the dissolution of Parliament. It is not easy to see how Henry VIII. could possibly have used constitutional means in overriding the wishes of his advisers, for the rules of the constitution have to be observed in the spirit as well as in the letter.

It might be urged that the King and Council from A.D. 827 to the thirteenth century could exercise creative as well as administrative functions, but it is respectfully suggested that the claim is not a perfectly sound one.

The Witan was a body which came into being to attend to such matters as affected the whole kingdom. The jurisdiction of the various communities did not coalesce or immediately pass to it.¹ When it eventually became a sort of National Assembly, all landowners (the members of the nation with political rights) were entitled to attend it.

The creative is bodied forth in the administration. The latter function must intervene between the former and the executive. The executive is the practical exponent of the administration. An "Act of State," whether domestic or *étranger*, is an act which carries the will of the administration behind it. No action lies against any body or officer for such an act in a court of justice, but a petition of right lies, in some cases, for an act of the executive which has not the lawful will of the administration, *i.e.*, government, behind it.

Some writers regard the Witan as a representative body.² It may, perhaps, have been representative in much the same way as the House of Lords considers itself to be representative of the will of the country to-day. Those who

¹ Stubbs, C. H., I., 133.

² Taswell-Langmead, 25.

attended were tacitly adopted as representatives of the rest of the freeholders. It was in theory a national assembly, and the paucity of new legislation may perhaps, to some extent, be accounted for by the very fact that the great majority of the freeholders did not attend its deliberations. There may have been a sort of give-and-take arrangement. The freeholders left matters to the Great Men and the Great Men recognised the title of the people to their own vested rights and laws. The Witan was an administrative rather than a creative body.

From 1066 to the thirteenth century the tenants-in-chief, who constituted the political *personnel* of the nation, were all entitled to attend the *Commune Concilium*, and this right was confirmed by the Great Charter. History, however, repeated itself. The *principes* only were regularly summoned to attend, and the *Magnum Concilium* arose, but with the result that a second representative assembly had to be formed to secure the participation of the nation in creative work. This national participation in the creative function, although almost submerged at intervals by the strenuous currents of political life, finally emerged and permanently re-established itself in the thirteenth century.

This recurring claim of the whole nation to participation in matters which trenched upon existing rights is only one of many similar recurring claims to establish and confirm early rights. They provide quite a feature in our constitutional history, and all tend to assert the inviolability of private right, with its inevitable corollary, namely, national sovereignty. Other examples occur in connexion with rights of property, voluntary taxation, and personal liberty. The antiquity of these principles, and their constant reiteration, in themselves give strong support to those who contend that the creative function in England has at all times been legitimately co-operative.

We now proceed to a more detailed study of constitutional law and practice from early times to Fortescue's day. The subject will be divided into two parts. The first part will contain a general survey of the distribution of the whole of the functions of government, and the second will deal more particularly with the participation of the King in executive matters, when we shall discuss the relation between the Executive, the Crown, and the King.

CHAPTER III.

PRE-NORMAN TIMES

THE NATIONAL character of the ancient Teutonic assembly, which made the laws and administered the affairs of the State, indicated that the prerogative power was in the hands of the people as a whole rather than in the hands of the chief magistrate (*scil.*, King). Mr. Adams says that the entire Germanic family in its known stages of development placed the administration of the law, as it placed the political administration, in the hands of the popular assemblies composed of the free able-bodied members of the community.¹ With regard to the condition of affairs in Germany before the year 100 A.D., Tacitus says that in minor matters the chiefs decided, in greater matters the whole assembly.² Cæsar³ says that our ancestors in Germany had no central magistracy in times of peace. With regard to England itself, Palgrave says that the Saxons had no definite idea of a supreme monarchy, they only had popular chiefs or eldersmen. Reeves declares that the King's authority was delegated to him by his subjects.⁴

All authority which was not given to the King by them, or acquired by him with their assent, must therefore remain with the people, or with those upon whom it has been conferred.

¹ Essays in Anglo-Saxon Law, I.² Germ., ch. xi.³ De B. G., vi., 23.⁴ H. E. L., ii., 530n.

This is important, as it places the burden of proof, in all cases of doubt, on those who would assert that at any particular time the King lawfully exercised this or that power for which no known constitutional sanction exists.

Freeman declares that in Anglo-Saxon times all important matters of government whatsoever were done by the King in the Witan, that the people were entitled to be present at the meetings of the Witan, and that they tacitly assented to the doings of that body.¹ Hallam² tells us that some of the grants made by the King without the consent of the Witan were revoked. Grants of land in many cases required the confirmation of the authorities, and in particular, where the land given was released from special obligations, and made allodial or heritable for ever, the consent of the nation was necessary, and the King who made such grants stated that it was done with the advice and consent of the *principes*.³

Kemble, in his *Anglo-Saxons*,⁴ sets out a list of the Sovereign duties, and states by whom they were performed. The list includes the following:—The Witan—

- (1) Considered every public act which could be authorised by the King.
- (2) Deliberated upon the making of new laws which were promulgated by their own and the King's authority.
- (3) Shared in making alliances and treaties.
- (4) Elected the King.
- (5) Deposed the King if the government was not conducted for the benefit of the people.
- (6) Co-operated in the appointment of prelates, and
- (7) Participated in the regulation of ecclesiastical matters.

¹ N. C., i., 102-111.

² M. A., ii., 279.

³ Stubbs, C. H., i., 145.

⁴ Kemble and Freeman were historians, and not lawyers, nor even constitutionalists in the strict sense of the term. Their views are in consequence put forward rather as the impressions of very learned men, to be received with great respect, than as statements of law.

- (8) Recommended, assented to, and guaranteed grants of land, &c., and
- (9) Adjudged the lands of offenders and intestates to be forfeit to the King.
- (10) Acted as a separate Court of Justice both in civil and criminal cases.

The King and Witan—

- (1) Levied taxes for the public service.
- (2) Raised land and sea forces.

These powers, in Saxon times clearly co-operative, cover to a large extent the present functions of sovereignty, and if it is contended that at any period when the laws of England were observed, the monarch was entitled to perform these duties without substantial co-operation from others, it must surely be shown when and how such authority was acquired. The King was one of the Great Men of the kingdom, and was entitled to deliberate, and therefore enjoyed the status of a member of the Witan. The Witan controlled the Executive, the chief Executive officer being the King. This chief Executive office gave an additional status to the King in the Witan not shared by any other Great Men of the kingdom, and this necessarily gave him special influence in all deliberative matters. Further, as Executive officer, the King carried out the decrees of the Witan, which further exalted his status and increased his importance, without, however, altering constitutional rights. King Edward (901-924) admonished his Witan to consider how public safety could be bettered, and asked for volunteers to assist him in carrying out reforms.¹ Athelstan lamented that the peace was not kept as it should be, and declared that his Witan would say that he had suffered it too long. He then said that he was determined with his Witan that those disturbers of the peace, &c.² Athelstan (925-936) willed that the bishops and provosts 'ordain' to all those who by rights should obey them that they should

¹ Liebermann, 141.

² *Ibid.* 167.

pay . . . beases, &c.¹ The following extract from the same work represents the view of the most constitutional of our early kings as to the legislative powers of the Anglo-Saxon monarchy :—

²“ I now, King Ælfred, collected these (following laws) and caused (them) to be written down, many of those which our predecessors held (namely) those which pleased me; and many of them which did not please me I rejected, with the consent of my Witan, and commanded (them) to be otherwise observed. For I durst not presume to establish much of my (own) in writing, for I was uncertain what would please those who came after us. I now Ælfred, King of the West Saxons, showed these (following laws) to all my Witan, and they thereupon declared that it pleased them all to keep (the same).”

The observance of laws was commanded by the King as an Executive act, but laws were rejected by King and Witan, as rejection, which involved legislature change, was a creative act.

The supply of revenue certainly has never come within the authority of the King, but has always been a co-operative function, exercisable from time immemorial by the people or their representatives. This has been re-affirmed again and again. At the debate at Woodstock, in 1163, Becket objected to pay an imposition which the King sought to make. Whether it was the Danegeld, as some authors say, or the Sheriff's 'local levy,' as Mr. Round contends, really does not matter. At the debate at Oxford (1197) Hugh of Lincoln objected to the levy for foreign service as unauthorised. The principle is admitted in the Great Charter of John (chap. 12) and has grown in strength ever since. The Church, as we have already observed, was another co-operative jurisdiction.³

Nor were the above the only species of authority in the

¹ Liebermann.

² *Ibid.* 47.

³ See P. & M., i., 126, *seq.*

hands of persons other than the King. Mr. Holdsworth observes that in the Anglo-Saxon treatises on law, and in the laws of Edward the Confessor, which were confirmed by the Norman and Angevin kings, it is assumed that much of the jurisdiction of the country was in the hands of landowners. Property and profits of jurisdiction were blended together.¹ Stubbs tells us that when the separate kingdoms amalgamated, their jurisdictions did not coalesce, and the central Witan came into being to attend rather to such matters as concerned the welfare of the whole kingdom.²

A co-operative jurisdiction sometimes arose by a grant from the King, but having been lawfully conferred, it was not withdrawn by the King and became a contributory function.³ For example: the Palatinate earldoms, the Marcher lordships,⁴ and several other jurisdictions and profits which were exercised side by side with the local jurisdiction of the hundreds and wapentakes.⁵ Grants of franchises and revenues of any estate of inheritance, however, were frequently attested by the Great Men of the realm. Sir Edward Coke is not accurate when he alleges that such charters always had this clause of *hiis testibus*, but it has never been suggested that his opinion does not coincide with the theory that the King was not entitled to dispense such matters without consulting his Great Men.⁶

Maitland tells us that the (commune of the) State differed rather in size and power than essence from the commune of the county or the commune of the borough.⁷

The Anglo-Saxon King was not the fountain of justice; justice was not administered in his name, but he (*scil.*, the *Curia*) heard cases where the suitor could not get justice or where the matter could not be tried in the court of his own hundred. The centralisation of secular jurisdiction

¹ H. E. L., i., 9, 10.

² C. H., i., 133.

³ It is submitted that the Council would naturally participate in authorising all grants of jurisdiction.

⁴ See Reeves, ii., 12.

⁵ Stubbs, C. H., i., 119.

⁶ Co. Lit., 7a. See also Petit-Dutaillis, p. 34.

⁷ 17 L. Q. R. 131.

was not completed until after the Statute of Marlbridge, 1267, by which time the Courts of the King's Justices had been set up with independent and substantive functions. In matters of public peace we learn, from the same authority, that there was the peace of the Witan (the general peace), and later the peace of the King which displaced it. Bracton suggests that above the King himself may be the greatest of all communities, the '*Universitas regni*.'¹

We must not omit to refer to the efforts made, sometimes with a fair measure of success, by individual kings to exert sole authority. When the King was strong and the Witan was weak, the effort was sometimes successful. Cnut's position was strengthened by his hus-carls. On the other hand, when the King had not a body of national troops at his disposal, his position was not, for the time being, so strong as that of some of his great feudal subjects. Edward the Confessor was but a 'shadow king.' This unconstitutional perversion of power, first on one side, and then on the other, was inevitable at a time when constitutional principles were vague, and legal redress, when pursued, was frequently of a physical order. Tacitus refers to this preference of the Teutons for practice over laws when he says that amongst the Germans good morals operated more than good laws in other countries.²

Many of our early kings must be charged with a tendency common to human nature, '*Omnia amamus sed principare magis*.'

The status of the King was also exalted, more in theory than in fact, by the efforts of the ecclesiastical lawyers. Both in the tenth and in the thirteenth century, as well as in the sixteenth and seventeenth, the ecclesiastics did their best to obtain for the King a complete supremacy in return for valuable concessions. Stubbs divides the clergy of the eleventh to the thirteenth century into three schools (1) the secular or statesmen, (2) the ecclesiastical

¹ Bracton, f. 171b.

² Germ., c. 19.

or professional, and (3) the devotional or spiritual. The first school, he says, sided consistently with the King, the second was on the same side when their privileges were not in danger.¹ In the Saxon period we find Edmund, Athelstan, and others adopting high and holy titles. In Bracton's time the King was "God's Vicar." The fact that the Church was then the only educated portion of the community doubtless accounts for the fact that the laws and literature of the times show such a marked tendency to extol the claims of the King, which made him appear to be in possession of greater authority than he was really entitled to.

Probably no ruler in historical times took upon himself to do right according to his mere will and pleasure.² "Sovereignty," says Guizot,³ "is not the will of a man, it is the personification of right, *i.e.*, the enlightened, reasonable, just will, superior to the individual will." He also declares⁴ that sovereignty of right can completely and permanently belong to no man, because no man can fulfil its conditions.

This completes our brief reference to the distribution of sovereign power in Anglo-Saxon times. It only remains for us to admit freely that the laws and functions then in existence touching the constitution were extremely indefinite. They lacked—

(1) Organisation, which they acquired from Henry I. to Edward I.

(2) Securities for proper administration, which were partially obtained through the controversies between Parliament and the King, in the reigns of Edward II., Edward III., Richard II., and Henry IV., concerning the administration and administrative appointments.

(3) Authentication, which has been secured, amongst other expedients, by statutes relative to the use of the royal seals, by the Act of Settlement (*see ss. 4 and 7*), and by numerous statutes specifically conferring substantive functions on the different officers and departments of State.

¹ Select Charters, 3.

² P. & M., i., 26.

³ Hist. of Civiz (Hazlitt) i., 164.

⁴ p. 166.

CHAPTER IV.

FROM 1066 TO 1307 A.D.

PART I.

THE PERIOD of organisation lies between 1066 and 1307, a time when most of the functions of government were brought to headquarters. The processes of centralisation and organisation went on together, but the whole of the functions of government, including those which were being gathered in from the county courts, the landowners, the Palatinate and Marcher jurisdictions, underwent a simultaneous process of disintegration at headquarters. Separate departments were formed, and these departments acquired substantive functions and independent jurisdictions. Thus whilst the old authorities were in some instances deprived of their powers, these very powers, or similar ones, passed to others who automatically became co-operative functionaries, and did not remain mere agents of the King.

The Norman Conquest provided a splendid opportunity for the kingly quest for absolute rule. Viewed positively, the kingship was indeed a most powerful function; viewed relatively in conjunction with the ancient and unsundered claims of the community to participate in working out its own salvation, claims which were eventually made good, the kingship was nothing more than the principal office in the Executive, or Crown.

It is necessary in constitution-making as in other large operations, involving changes and amendments, to deal with functions *seriatim* (human capacity or human incapacity forbids more), and whilst so doing to appear to exalt the function of the moment relatively too high.

As the other functions, *e.g.*, the judiciary, the chancellery, the councils, were dealt with, the powers of each were asserted, and, as a result, the office of kingship was automatically reduced to its proper and relative dimensions. The King at this time discovers his positive status. His relative status is discovered for him.

Another explanation of the large powers exerted by the King from the eleventh to the thirteenth century, relating to matters of a temporary nature—powers which must not be allowed to challenge too severely the continuity of other sovereign functions—is the transitional character of that period. Two peoples were being united into one, two systems of law were contending for unification. The population and activities of the country were increasing rapidly, and rapidity of thought and action were required. The royal power increased because the duties increased, but was the King at any time entitled to administer, free from consent or advice?

We cannot expect united action by the people at first, for the nation itself did not realise that it was no longer two peoples but a united race, distinctively English, until the reign of Henry II., nor was the notion of the law as something distinctively English grasped until Bracton's time, when the judges refused to admit foreign precedents, even when no appropriate English precedents were to be found.¹ Many of the barons themselves became truly English only after the loss of Normandy severed their connection with France. Neither must we forget the fact that up to the time of Richard II. the kings still contended for the reception of the laws of Rome, which favoured the theory of Absolutism.

The foreign ecclesiastics, in seeking to impose the legal philosophy of Rome on a new State, overlooked the fact that experience alone can provide a nation with the true premises for the deductions of legal philosophy. Personal

experience alone can be adopted. History must be adapted. Hence the mature theories of kingship which were brought by the civilians and canonists to England in its infancy, when its method of rule consisted but of a gathering practice, were proffered for partial acceptance only.

The civil constitution of Rome, the autocratic character of which was intensified in its ecclesiastical system, had matured along its own peculiar lines, until its legal system was completed and its political genius exhausted. The country was then compelled to submit to the authority of the Imperial Superman—a prospect which failed to impress or appeal to the young England, which loved liberty and equality, and had an alternative system of its own to mature and give to the world. That system was to produce a co-operative or contributory sovereignty, which indeed was to include the rule of authority, but an authority more wisely and justly disposed. It is submitted that the England of mediæval times never relinquished the task nor submitted to royal autocracy, either in deliberative or executive matters, and if here and there it appears for a time to have suffered arbitrary rule, the events anterior and subsequent to such unnatural lapses belie the substance of the suggestion, and proclaim to the jurist that the English ideal of government of *the Commonwealth by the Commonwealth* was a continuous ideal and an unfailing resolve.

Rome developed the bare notion of authority and inculcated duty to authority, but did not discover its true constituent parts. England was to discover how authority should be constituted and to evolve the Rule of Law, the most perfect, and, incidentally, the most impersonal and impartial human authority by which mundane society could possibly be governed. Rome had worked up governance into such an art that it came to regard the rules of the government as of more consequence than the needs of the governed. The Germanic nations reversed the

order of things, and went perhaps too far the other way, by failing to recognise sufficiently the importance of law. England was to incorporate authority and law into one system.

Replete with the result of its labours, and infatuated with a sense of its own sufficiency, Rome remained in the thrall of the past. It condemned the future and all that it was destined to unfold. Because its jurisprudence had reached its full stature, it imagined that jurisprudence itself had attained its fullest possible development. It therefore proceeded wherever it went to dominate jurisprudence instead of serving it. *Mais nous avons changé tout cela.*

In the England of the eleventh and twelfth centuries the rôle assignable to the jurists was really a minor one, namely, that of suggestion. The primary need of the nation was for lawyers to expound, and judges to administer the laws, and when these allies did arrive upon the scenes in the thirteenth century, they preserved the institutions of the people.

The view which Reeves¹ takes of this period is somewhat different. He suggests that the accredited authority of the King was really very great, and that it was *curtailed* by subsequent laws.

It is, however, respectfully submitted that the evidences we have of the distributive nature of sovereign functions in Anglo-Saxon times, and the proofs we have that the right of co-operation was fought for at every stage, and gradually affirmed, entitle us to refuse to pay too much attention to the temporary usurpations or extensions of power which the Monarch owed rather to the exiguous or "emergency" causes already mentioned, than to permanent principles, or the sanction of the Constitution. If *Universitas regni* is greater than *Rex*, the *Nullum Tempus* maxim applies equally to the *Universitas regni*, and the nation is entitled to urge the retention of the constitutional

¹ H. E. L., I., 241.

principles which were temporarily placed in subjection or abeyance by royal duress, but which there is no evidence that it ever consented to surrender. Moreover, it was not the kingship alone which was exalted during this period. Other functions of government supplemented the Anglo-Saxon kingship, and "the most magnificent creation of the Middle Ages" in the hour of its greatest magnificence, had to submit to co-operation in administration as well as in legislation.

"After the Conquest," says Freeman, "the King was half despot, half feudal lord, until the 'second birth of freedom' in the thirteenth century." Instead of second birth, may we say the reassertion, or confirmation of freedom. The feudal portion of the King's position at the Conquest no doubt gave the Norman Kings a greater control over affairs, but the feudal system was not a definite and continuous ideal. The history of feudal law is the history of a series of changes which leave unchanged little that is of any real importance.¹

Sir Matthew Hale² states that a conqueror only conquers the King and not the people or the laws. The latter is an independent task.

The Norman and Angevin kings, though successful in centralising and developing the powers of the executive, yet failed to alter the general character of government to any great extent. The explanation is simple enough. The laws of anthropology obstructed the process, and foiled any attempt to quench the Anglo-Saxon spirit or subvert the general character of English institutions. "Institutions," says Mr. Frazer, "are a portion of the domain of anthropology."³

Professor Ridgeway declares that the isolation of conquerors from their original homes and from the mass of those who speak the same language, is a solid factor in the tendency of the conqueror to merge in the conquered.⁴

¹ P. & M., i., 67.

² History, C.L., ch. 5.

³ Early Kingship, p. 2.

⁴ Early History of Greece, i., p. 647, *seq.*

And this, it is submitted, was the final and inevitable state of the Normans who settled in England. The constitutional conflict at this period resolved itself into a human struggle in which the decayed strength of Rome, with its notions of impervious and impeccable authority, was forced to yield to the incipient might of a new and emerging race destined to construct a more rational authority out of more liberal materials.

‘The dreamer cannot construct society out of matured theories.’¹

In connexion with the period extending from 1066-1307, we plead also for liberty to attach importance to major rather than to minor events of history. If we simply apply our minds to a minute investigation of the shorter phases of political life, such as the reign of William I., we are bound to admit that the King frequently exercised almost uncontrolled authority, but a reference to the kaleidoscopic changes of the shorter periods does not enable us to give such a faithful interpretation of the 1500 years of English history as may be obtained from a more comprehensive survey of the general tenor of events.

The most important change made in the reign of William, namely, the imposition of the paramount authority of the King over the land at the Council of Salisbury, was not in fact the act of the King alone, but a compact between the King and the landowners, and the allegiance there taken only involved obedience according to the law.²

The judicial system of the Saxons was accepted by William and was administered under new names in the same way as before, that is, the Norman Vicecomites as justiciary replaced the Saxon *Scir-gerefa* and periodically held the customary courts in the county or hundreds. The jurors were, as in the Saxon days, the freeholders of the county.³ The constitution of the “King’s Courts” following upon the

¹ Frazer, p. 1.

² Cf. Locke’s Civil Government, c. 13.

³ Gneist, C. H. E. (1891), p. 136.

Norman Conquest is noticed later, from which it will be seen that they should properly have been called the State Courts or some such designation embodying the idea of the State. Mr. Pike points out that the House of Lords still retains a portion of the right of co-operation which it exercised at this period, and that the judicial functions of the Privy Council also represent co-operative duties which accrued at a very early date.¹

Mr. Holdsworth sets out the relations of the Great Council of State of the twelfth century to the King. He says that the work of the *Curia Regis* was legislative, administrative, and judicial. It took part in administrative measures, such as the appointment to bishoprics, arrests, matters of peace and war, and questions affecting the state of the kingdom. It had little power in the twelfth century to insist upon its prerogatives, but the King was none the less sensible that its counsel and consent added weight to any measure of importance. In judicial matters, its jurisdiction was greatly increased in the reign of Henry II.² The Exchequer by its system of audit also exercised a general supervision over the country. The Chancellor and Chancellery were in direct connexion with all parts of the constitution, and the idea gained ground that the Great Seal was authentic though used contrary to the royal will.³

The functions of the Witan do not appear to have been divisible, though the King had his household officers. With the *Curia* in William's time the importance of the officers of the royal household increased. Officers soon became offices, and they acquired substantive jurisdictions of their own. If the King sowed the seed, he sowed it in national soil. And yet perhaps the Council participated in all these operations. Mr. Pike says⁴ "I will then ask you to regard the King and his Court of Council as the starting point of our constitution." This affirms

¹ Public Records and the Constitution, 21, 22.

² H. E. L., i., 26.

³ *Ibid.* i., 195.

p. 11.

a full-blooded principle of co-operation that cannot be discredited by the theory of kingly authority. In fact it challenged the restricted notion that the English constitution is a Monarchy, and, at the same time, it, in effect, supports the author's contention that the executive was of greater dimensions than the kingship. Bagehot and President Lowell have discovered a metaphysical "Kingship" which is frequently treated as co-extensive with the Executive, but it is better to call a spade "a spade"; in other words, to call the Executive "the Executive," or, at the lowest, the "Crown."

Whilst the kingship was less than the Executive in many respects, in others, owing to its personal nature, it was able to perform services which no State Executive, being a mere collection of officers, could possibly perform.

If it cannot be said that William was much restrained by the *personnel* of his *Curia Regis*, still he was compelled, in order to overawe the *Curia*, to make terms with the English people, which stultified his pretensions with regard to the *Curia*. A considerable amount of jurisdiction was about this time detached from the Crown, and handed over to the Church.

The Council of Magnates had the right to be consulted in legislation,¹ and 'legislation' comprised a great many 'administrative' questions in those days. For instance, the principal part of the legislation in Henry II.'s reign consisted of directions to his justices, matters chiefly of organisation and procedure. In Richard I.'s reign the work done by the Government consisted chiefly of judicial decisions and the issue of writs in Chancery.² Therefore, the right to take part in administration was involved in the right to participate in "legislation." Creative legislation which affected existing rights was not

¹ Stubbs, C. H., i., 400.

² P. & M., i., 170.

within the power even of King and Council. Existing rights were regarded as being of a permanent nature, and a statute was required to alter them. Sir M. Hale calls a statute a tripartite indenture between the King, the Lords, and the Commons.

The learned authors of Pollock and Maitland's "History of English Law" hold that any such conception as that of 'the State' hardly appears on the surface of the law.¹ That was to come later. Beneath the surface of the law, however, lay those principles of liberty and equality, involving co-operative government, which characterised the Teutonic race, and a firm resolve to adhere to the ancient laws of England, which were in course of time to produce formal recognition of the situation.

Maitland not only tells us that there was Crown property as early as the year 904 A.D., but he suggests that it stood outside the national system of justice and finance,² from which we can infer that the State entity was looming into sight even then. Bracton recognises the existence of "public law" in his day.³ In the Act 35 Henry VIII., c. 1, regulating the succession to the throne, we find a suggestion that the King and people were united as a corporate body. Hallam considers that after the Commonwealth the people were indestructible as a political hegemony.⁴

¹ P. & M., i., 230.

² P. & M., i., 230.

³ Domesday Book and Beyond, 276, 277.

⁴ H. E., ii., 354.

CHAPTER V.

FROM 1066 TO 1307 A.D.

PART II.

THE REIGN of William II. throws no light on the constitution, as this monarch 'feared neither God nor man,' but even William's Flambard proves a nemesis to the kingship. The co-operation came from the wrong quarter in Flambard's case, who was a sort of perpetual justiciar acting in the financial and judicial departments at pleasure. His position only showed the impossibility of informal co-operation, for out of his office grew the great office of Justiciar, from which issued so many of our administrative offices of State.

Henry I. adopted the laws of Edward the Confessor and William, and confirmed the jurisdiction of the old Hundred Courts, and we read that throughout Norman times the right of 'sake and soke,' and the jurisdiction to try cases belonged sometimes to the law, sometimes to the Church, sometimes to the King.

The itinerant justices sent forth in the reign of Henry I., and the fact that they constituted part of the so-called Royal Justice, brings us back once more to the question of superior justice. Whose justice really was it? We know that in Anglo-Saxon times it was the justice of the Witan. We know also that the real repository of justice in Norman times was the King and Council.¹

Who then created the jurisdiction upon which was based the commissions issued by the King to the itinerant justices?

¹ See Pike, House of Lords, 279.

The King was the chief magistrate of the nation, and he sent out justices when he could not perambulate the country himself. By what authority did he do so? Presumably it came from the governing body of the nation, the King in Council. There does not seem to be any specific ordinance authorising Henry I. to issue these commissions: perhaps it was an old custom. When, however, we come to the assizes of Henry II., we find that they were the work of King and Council, *ergo*, the King and Council were the fountain of justice in the latter reign, and this tallies with the original practice which existed in Anglo-Saxon times. Pike says that the justices in eyre took over the business of the King's Courts in the early reigns after William I. The King's Court surely means the King's Court or *Curia* which was the National Assembly. When we get to Magna Carta, not only do we find that a trial by *parēs* is ordered, but that even the King's power to select judges is limited by s. 43, which requires him to appoint those who know and will administer the law.

Why then did actions abate when the King died? The answer is simple. It was because the King had summoned the parties before the court, but this he did not as a judicial but as an executive act. The King alone never was the fountain of justice, the King never was the actual dispenser. He presided over the function and over the courts, saw that justice was properly administered, and contributed his assistance as executive officer by summoning parties before the court and carrying out its decisions.

President Lowell considers that the King was not the fountain of justice, but its dispenser, but he says¹ that "English law was a body of rules enforced by the national courts." This suggests national justice. On the same page he, however, says that the *Crown* was the fountain of justice; but the Crown, it is submitted, was only another name for the Executive. The same learned authority

¹ Lowell, i., 24.

expressly distinguishes between "Crown" and "Crown in Council." The Executive could not in early times administer justice, as the administration of justice was a discretionary act and not an act of performance simply. Deliberative acts were performed by the King and his Great Men in Anglo-Saxon times, and by the King and Great Council in Norman times. After the Permanent Council came into existence, it took over a portion of the deliberative work. The judges of the courts called the King's Courts were originally members of the Great Council, and when they became detached officials they did so with substantive functions, which constituted them substantive members of the Executive, and not part of the kingship, for appeals and references went from them back to the Council Chamber or Parliament from whence they and their functions had issued. The Chancery jurisdiction was also at first a Council function, so far as it was a Court of Justice. The Provisions of Oxford (1258) show that the Chancellor, whose duties were secretarial, had been taking on himself the task of framing new writs. The King might issue writs but could not frame new ones, and the Provisions of Oxford show that the Council had observed this activity with disfavour. Naturally, for a man who can make a legal writ can make a legal right.¹ The Chancellor then swore that he would seal no writ, excepting writs of course, without the commandment of the King and Council.

What then has been the effect of all this theory about the King's justice and King's judges? The answer to this is that the notion has done much to mould later changes in the law,² but it did not interfere with the predominance of the national element in the administration of justice, nor with the fact that jurisdictions and judicial powers were created by national and not by royal authority. Neither did it make a judge after he separated from the Council and became

¹ ii., 474.

² See Carter, *History of Legal Institutions*, 119.

a substantive official, a creature of the King. The theory created a name, but English justice by any other name would still be national justice. The King supervised the judges in the performance of their duties on behalf of the Council, but he did not dispense justice himself.

The reign of Stephen was practically a period of anarchy.

“ The sixty years which followed the death of Stephen is a period of constant growth. The chain which connects the peace of Wallingford and the Charter of Runnymede is traceable, link by link. The nation . . . at the end of the period states its claim to . . . self-government as a coherent society. The royal power . . . has forced on the people trained under it, the knowledge that it must be curbed and that they have the power to curb it.”¹ The reign of Henry II. sees the rule of law. The administrative machinery becomes part of the constitution, being embodied in the laws. The King himself was taking the lead in formalising a rule of law which was to bind his successors.

The “ King’s ” justices, who were bound to administer the law independently and faithfully, enjoyed functions which, according to Sir Matthew Hale² were considerable and important. They were entitled to deliver three kinds of decisions :—(1) of law, (2) deductions from the law, (3) common reason. Sir Frederick Pollock refers to this statement as “ Hale’s gloss,” and with excellent reason, so far as it alluded to later times, for the power of the justices greatly diminished when they separated from the Council.

The King, no doubt, occasionally sat in court, but not frequently, and it generally happened in the King’s Bench where cases affecting the Crown were being tried, or in criminal proceedings where the peace of the Crown was concerned. Such cases were of peculiar interest to the King, and his participation therein may be regarded to

¹ Stubbs, C. H., i., 482.

² H. E. C. L., 69.

some extent as an exercise of the prerogative right to intervene and safeguard the rights and dignity of the Crown.¹ Under Richard I. the administration of William Longchamp, the King's Chancellor, was displeasing to the peers, wherefore they banished him.² In the next reign but one, it was the administration of the King himself which was challenged, and specific co-operation was provided for him.

Of King John we read³ that the only way to defy the faithless lord was to take up arms. Obligations existed, but not the normal safeguards for their observance.

The Great Charter was a struggle of might to determine and enforce right, and was mainly restorative of the law.⁴ Mr. Jenks regards the Charter largely as a piece of feudal reaction in favour of the great landowners. The writer is of opinion that it was a successful attempt on the part of the "Great Men" to re-establish the constitutional rights and status which were slipping away from them. However that may be, it certainly ensured the administration of English law in our courts, and nothing better could have happened from a national point of view. In the Great Charter we get, according to Mr. Holdsworth, the first attempt at the expression in exact legal terms of some of the leading ideas of constitutional government; it becomes clear that there is a united community which desires some share in Government, and which has power and will to correct abuses in the administration of the law.

Stubbs says that Magna Carta was the termination of one conflict and the beginning of another. There is ample evidence in the period from 1066-1307 that the nobles and the people were in continual conflict with the King over constitutional questions, which must discount seriously any claim that the powers assumed by the King were assumed with the sanction of law.

¹ Campbell, *L. of C.*, i., 89.

² Hallam, *M. A.*, ii., 325.

³ *P. & M.*, i., 183.

⁴ *P. & M.*, i., 171-172.

When we get to the reign of Edward I. we perceive a "State" authority in an advanced stage of development. Stubbs¹ says that the people were showing increasing powers of self-government in Henry III.'s reign, and in the first twenty years of the reign of Edward I.² By 1295 and 1297, out of the organic completeness of the constitution sprang the powers of resistance and out of the resistance the victory of the forces, which Edward might guide but could not coerce.³ Edward I., like Edward VII., was a successful King because he was eminently fitted for his post. He exercised great personal influence. The wills of these two kings were so well attuned to the calls made upon their kingship that constitutional discussions become, for the most part, superfluous. They may be regarded rather as types of kingship than as kings in the concrete. It will be shown later on that Edward I. in his royal capacity was not co-extensive with the executive.

The State machinery which was set up by Henry I. and Henry II. became under Edward "a definite organisation worked by an indwelling energy." Co-operation had now become automatic. It is interesting to note that in the present right of every individual peer to interview the Monarch on State affairs we have evidence of the right which the Great Men enjoyed to co-operate with the King in government.⁴ This would be a right to deliberate; not, of course, to play a part as a member of the Executive.

Many of the alleged prerogatives of the King were curtailed before the reign of Edward III., *e.g.*, the right to levy war without the consent of Parliament, the granting of monopolies, the extension of the forests, loans, the arrest of Members of Parliament, the right of pressing men and ships, the levying of arbitrary fines. All these and other duties passed into the hands of duly constituted authorities.⁵

¹ C. H., ii., 306.

² *Ibid.* 317.

³ *ibid.* 106.

⁴ But *see* Pike, Constitutional History of House of Lords, 252, 3, hereon.

⁵ Reeves, iii., 432.

By Edward III., c. 8, and 2 Richard II., c. 10, it was provided that justice was to be administered without interference from the executive departments. Lord Campbell makes the general observation that nothing was more common than for the King in Plantagenet times to consult Parliament on administrative questions such as peace and war, and as to the manner in which war should be carried on, tenths and fifteenths being more readily voted when this was done. The purse was used as a means of securing a share in administration as well as in legislation. About this time a further defect was revealing itself. The selection of ministers by the King must be watched and proper checks imposed. Tenure of office during the King's pleasure produced subservience to the personal will of the Monarch, and weakened the constitutional mandate.

CHAPTER VI.

1307 A.D. TO THE WARS OF
THE ROSES.

WE NOW pass to the period in which Parliament commences its struggle for the control of the two lesser functions, the Administration and the Executive. The nation is now seeking for *securities* for a corporate sovereignty, as, in spite of the theory of separate government departments, and officers therein bound by oath to perform their duties in accordance with the law, it is found that the King has too much influence with his officers and too much power over their actions.

There was, moreover, another reason for the intervention of Parliament. Edward II. had so many favourites that a Court party devoted to the King came into existence, and a struggle ensued between it and the King's Council. But the Court party served one good purpose. As the attempt to foist the Roman laws upon the country had roused national consciousness, so the attempt to govern by a Court party roused in the national administrators a determination to insist upon their rights.

In the deposition of Edward II. Freeman sees but an exercise of the ancient power which the Witan possessed of deposing the Sovereign for bad government. In the next reign we find three parties striving for the control of affairs; Stratford, the champion of constitutional administration; Burghersh, the spokesman of the Court party; and Orlton as the agent of the Queen.¹

¹ Stubbs, C. H., ii., 386.

The King's selection of officers was frequently challenged, and particular attention was paid by Parliament to the office of Chancellor during the period we are now considering. In 1249 Parliament loudly complained about the King's favourites, and said that he had not the proper officers in his Council.¹

In 1302 Parliament again tried to make the offices of Chancellor, Chief Justice, and Treasurer elective. Edward I. replied :—²

" I perceive that you would at your pleasure make your King truckle to you and bring him into subjection. Why have you not asked the crown of me, also? While, at the same time you look upon that as very fit and necessary for yourselves, which you grudge me, that am your King, if I may not appoint my Chief Justices and Treasurer, I will be no longer King. Yet if they or any other officers shall do you any wrong or injustice, and complaint be made of it to me, you shall have some reason to grumble, if you are not righted."

The barons begged pardon. A very interesting declaration, and one which raises the whole metaphysics of the case from the King's side; but Parliament intended the Crown officials to perform their proper functions without undue interference by the King.

The claim by Parliament to participate in the appointment of officers was only natural. It was simply an effort to ensure the due performance of substantive functions as to the State and not as to the King, *qua* individual. It involved no alteration in the law, for the King had not chosen officials as a matter of clear legal right. It may be said, however, that surely the King possessed the constitutional right to select officials? To a great extent no doubt he did, but the function was a national and not a personal one, and if it was conceded to the King, it was conceded subject to the condition that it was properly exer-

¹ Campbell, L. of C., i., 137.

² 1 Parl. Hist., 48 and 49.

cised as a national function. The King's powers *qua* individual, his powers as principal officer of the Executive, and the powers of the Executive differ greatly, though they are usually confused in the books, and are all regarded vaguely as belonging to the "King."¹ The King, of course, comes into them all, but not always as the sole deliberator and executant of the two latter functions.

In 1310 Parliament required Edward to dismiss his ministers; the King dismissed his Chancellor and the Lord-Lieutenant of Ireland. In 1311 Edward found it necessary to confer upon a Committee of Parliament the power to appoint all the great officers of State.

It is true that communications in reference to these matters were addressed to the King in a precatory form. It by no means follows, however, that a petition by a constitutional inferior, however humble in form, or a grant by a superior, however "gracious," proves that the inferior was in point of fact a mere suppliant without a right, or that the superior was without a constitutional obligation. This was the epoch in which the Roman ecclesiastics imposed the forms of autocracy upon the English people, but failed to impose the substance. The Crown was dignified by the adoption of despotic forms and, with it, also, the King, who was the principal officer of the Crown. There the matter ended.

In Edward III.'s reign a petition was presented asking that the Chancellor and other great officers should be chosen in Parliament, and they should be sworn to obey the laws of the land and Magna Charta. The King replied that he would appoint with the assent of his Council, but that officers should be liable to answer all objections.²

We might also observe, in order to show the practical interest which Parliament was then taking in administration, that in the reign of Edward III. it asked that the Chancellor might be a Peer and the Barons and Commons asked that he might be a layman.

¹ See *Law Times Newspaper*, vol. 127, p. 128.

² Campbell, *L. of C.*, i., 241, 2.

In 1376 the King's officers were again attacked, and even his intimate friends who perverted the administrative and Executive functions were objected to.¹ Further complaints and demands came from Parliament in regard to the executive officers in 1379, 1381, and 1386. On the last occasion Richard II. consented to remove his Chancellor, the Earl of Suffolk, on a demand from the Lords and Commons. The ex-Chancellor was impeached shortly afterwards. The ex-Chancellor's master, the King himself, was next removed from office, and the administration was arranged for by the Lords and Commons.

As soon as Henry IV. ascended the throne the Chancellor laid down his office to the King in the presence of Parliament, and was re-appointed by Parliament.

In the reign of Richard II. Parliament began to assist in the administration in another direction, namely by appropriating supplies.² This move was repeated in the reign of Henry IV. In the reign of Edward III. an audit of accounts was demanded.³

Sir Harry Nicholas, editor of the Privy Council Records, which start in the reign of Richard II., observes in the introduction to that work, that writers have not defined the limits of authority which the Council exercised in the reign of Richard II. or brought its duties under any general principle. The learned editor informs us that it controlled every department of State. We can, therefore, understand the importance of the action of the Commons in trying to secure the control of the appointment, which involved indirectly the control of the actions, of the King's Chancellor and counsellors. Members of the Council were nominated (according to the same authority) by the King, but the wishes of Parliament were considered. Such Members were frequently appointed and sworn in Parliament, and the regulations by which the Council was governed were frequently discussed in Parliament.⁴

¹ 1 Parl. Hist., 169 and 170.

² Stubbs, iii., 409.

³ Hallam, H. of E., ii., 355.

⁴ Rot. Parl., ii., 322b; iii., 16 and 634.

On page fifteen of this introduction the editor states that the Council at times acted under a consciousness of being responsible to Parliament for their conduct, and they maintained their opinion in opposition to the King with a degree of firmness which varied, however, with different councils and different kings. The grants of the King on petition also show the activity of the administrative officers. Some petitions were dealt with by the King with the advice of his Council, some by the advice of his treasurer, &c. In only one case does the King grant alone. Petitions were sometimes addressed to the Council alone, sometimes to the King and Council, sometimes to the King and Lords in Parliament.

In Vol. I. of the "Privy Council Records"¹ we find that the Council apportioned its own business amongst its respective officers. The minutes of this sitting are too long to repeat here, but they show definitely the substantive and co-operative nature of its duties.

It was quite usual to transact the ordinary business of the day without the presence of the King, but certain matters were deferred for his consideration, for example, matters of foreign policy² and matters which affected the King himself. There was no absolute rule as to the part which the King played at these sittings, but it is perfectly clear that he was by no means the sole administrative authority.

Henry IV. ascended the throne as the champion of corporate government, and Parliament was in a mood to keep him to his principles. At the meeting of Parliament on 6th October, 1399, Archbishop Arundel struck the keynote of the Lancastrian policy by declaring that Henry would be governed by the 'wise and ancient of his realm,' that the affairs of the kingdom lay on the Parliamentary leaders, and that Henry's government would not

¹ p. 18a, and p. 18b.

² Vol. III., p. 128.

be by his personal will but by common advice, counsel, and consent.¹ The knights of the shire immediately demanded the arrest of the evil counsellors of Richard II., and popular feeling supported their demands.²

Charges against and proposals for restraint upon the Executive were made at a Council held in 1403, prior to the meeting of Parliament in the following year, and when Parliament met, the Commons, by petition, asked for the removal of certain members of the royal household, to which Henry assented.³ It is clear from the above that Parliament had gained a firm grasp of the administration. A great many events of a similar character occurred both in the reigns of Henry IV. and Henry VI.

In 1427 we find Chancellor Kemp intimating the doctrine of the joint liability of the lords of the Council for acts of government during the minority of the King save where Parliament intervened with directions.⁴ It is perhaps sufficient to conclude this period with an expression of Fortescue's views contained in his work on the "Monarchy" written in the reign of Henry VI. He says that the King may not part with his revenue, *e.g.*, land, as it would be dilapidation of the Crown and would injure the realm;⁵ that rewards should be granted by the King in Council and not by the King alone;⁶ that if the King endow the Crown with royal treasure, it is not alienable thereafter without the consent of Parliament.

Fortescue also contends that officers of State who are paid by the nation should not be appointed arbitrarily by the King, and asserts the necessity of many counsellors to assist the King, and that the King should give heed to them.

Dr. Gneist considers that the fourteenth and fifteenth centuries were the transitional period from the older

¹ Stubbs, C. H., iii., 14.

⁴ Stubbs, C. H., iii., 108.

² *Ibid.*, iii., 19.

⁵ *Ibid.*, 77 and 78.

³ Rot. Parl., iii., 524-7.

⁶ *Ibid.*, 102.

methods of administration to the modern political system. He says¹ that the King no longer appears as the personally commanding ruler, the source of feudal, military, judicial, and magisterial law, but that the Crown appears as a permanent institution which guarantees legal protection and permanent support to the life of society, and thus takes firmer root in the hearts of the people. With this restriction by law, there accrues also to the King himself a firmer legal protection, and to his rights enhanced inviolability and sanctity.

Some learned readers will agree with Dr. Gneist in holding that the administration had by this time passed into the hands of the Crown. Others will consider that the transfer took place in the seventeenth century. The author ventures to think, however, that it will be made clear that in all deliberative work, both creative and administrative, rules and practice of English government have always demanded co-operation.

Both William III. and George III. expressed the notion that the King should be "King" in the true sense of the word, and they complained that their alleged rights were being withheld.² This is not surprising, for the expression "King" is, and always was, a misleading one. Edward I. made a similar suggestion. The English Monarch has never been sovereign. The claim has existed in theory, and has too often been allowed to pass into currency. In practice he has simply been, except in "idea," the Chief Officer of State. The word "monarch" was a misnomer from the first moment that it appeared. King, Monarch, and Sovereign are simply expressions for the three degrees of political fiction.

¹ p. 444. ² See Hallam *H. E.*, iii., 117, 8, and May, *C. Hist. of Eng.*, i., 108.

CHAPTER VII.

THE COMPASS OF THE EXECUTIVE

WE PROPOSE now to devote special consideration to the work of the Executive, and to show that it meant something more than the office of kingship, and in so doing, to discuss the relation between King and Crown.

We have noticed that the sovereign authority consisted, roughly speaking, of (1) an inner ring of persons placed upon a constitutional platform by national consent, and which is frequently called 'the State,' and (2) an outer ring consisting of the nation at large continuously exercising its unalienated and inalienable prerogative of making and modifying law by changing itself or its mode of life. The sovereignty was treated analytically, the King being displayed as a part of it. The aim now will be to consider more especially the position of the Executive, and to demonstrate that the King did not monopolise the whole even of the executive functions.

The historical *rôle* of the monarchy is the executive one. What was planned by many could most conveniently be carried out by one. The coronation oath of the early kings indicates that the kingship was an executive function. The proper coronation oath, according to Bracton, is a promise (1) to keep the peace, (2) to forbid all theft and unlawful dealings to all estates, (3) of justice and mercy in all judgments. These are all executive matters.¹ However, the necessity for control, the multiplicity of duties, and the lack of a perfect theory combined to render it impracticable that one alone should exercise the entire executive authority. The fact that the Government was carried on formerly in the King's name does not

¹ Liebermann, 217 ; Bracton, bk. 3, ch. 9.

necessarily mean that it was carried on by the King's sole authority. It is invariably the rule in all countries where there is a monarchy with a limited authority, to make it a symbol of authority to administer judgment in its name! In the executive function, which is the most subordinate of the three functions, the Monarch fills a very large part of the stage. The German King was primarily appointed as a man to carry out the laws and to lead the nation in time of war. So large is the part played by the Monarch in executive work that stricter proof is required in support of any allegation that the King as executive officer acted in co-operation with others. Evidence must especially be directed to the period lying between A.D. 827 and the end of the thirteenth century, for after that many of the departments of State were well established as substantive institutions. To challenge the individualistic theory within the province of the Executive is indeed a bold thing, but if facts are of more weight than theory there need be no apprehension as to the issue.

President Lowell agrees with the notion that the office of kingship is now less extensive, in point of fact, than the Executive, for he says in his "Government of England"¹ that 'the government is still conducted in the King's name, and *largely* by means of the legal rights attached to his office.' *Ergo*, the government is in part carried on by means of legal rights outside the Kings' office. Statutory powers given to the various departments of State Professor Dicey regards as being outside the 'prerogative' functions, which latter he defines as the residue of the original prerogative power of the King. Whether the word "prerogative" must be so restricted in meaning, or may be held to comprehend the whole of the existing rights of the Executive arising at Common or by Statute law, it is clear that the distinction must be made when separating the powers of the King in the Executive from those powers which were exercised by others.

¹ i., 16.

One is sometimes apt to overlook the fact that these supplemental State powers, of which the effect is to convert the King into the Executive, have been in process of creation since very early times. President Lowell associates the idea of the present day Crown with the executive function and treats them as coterminous. He says: 'That the Crown is at the head of the executive branch of the central government, and carries out the laws so far as their execution requires the intervention of a national public authority.'¹ He declares² 'That all Executive power is exercised in the name of the Crown and by *its* authority.'

These quotations from President Lowell's well-known work are used by the present writer because they are capable of suggesting (whether intended so to do or not) the three ideas which form the basis of this portion of the subject: namely (1) the presence of the Executive as a substantive function; (2) the fact that all executive power is exercised in the name of the Crown and by *its* authority, and (3) that the legal authority of kingship does not and never did cover the whole of the executive or Crown authority. President Lowell³ actually draws a distinction between the mediæval King and Crown, for we read: 'The strong hand of the Norman and Angevin kings welded the country into a nation, and in the fulness of time the Crown had accomplished the work of unification.' This sums up the position—the dimensions of the King and the Crown are not the same. The latter was then but a mighty agent of the former.

It is hoped, in the course of this short work, not only to adduce sufficient evidence to show that the Executive was always more extensive than the kingship, but also to prove that the expression 'Crown,' which Maitland regarded as a modern introduction, has been, ever since the Conquest, the true descriptive tile of the Executive. The word may

¹ Government of England, i., 20.

² *Ibid*, 21, 22.

³ *Ibid*, p. 16.

perhaps have strayed into this country at a somewhat earlier date as intermittent communication had been opened both with Normandy, and, in a more continuous fashion, with Rome. Instances of such a real or supposed user occur, and certain of them are mentioned here, but it is assumed that apart from the word "King" and the fanciful titles bestowed upon the King, not by the people, but by the representatives of Rome, and which must be regarded as so much stage-craft, there existed in Anglo-Saxon times no expression which definitely purported to symbolize the entity of the State and the executive functions at large. In the laws of William I. we read 'These fines belong to the Crown of the King.'¹ The fact of Crown government was too obvious in the seventeenth century to escape detection, but the constitutional changes made about that time rather secured and authenticated than created the principle. Sir William Anson appears to suggest a distinction between the Executive and the office of kingship, when he declares that 'The need of a central authority to strike at offenders reconciled the people to the substitution of the King's peace for the folk's peace; of the strong arm of the Executive for the general disapproval of the community, of State interference for *laissez-faire*. Sir Edward Grey, speaking at Sunderland,² on 20th December, 1909, distinguished between "King" and "Crown" in the following observation: 'When any reference is made to the constitutional position of the Crown, it is made without any reference to the person or personality of the King himself.'³

Certainly nothing which actually emanates from the King is commensurate with the executive function. For instance, the office of the Executive is a totally different thing from the *will* of the Monarch. *Non erit rex dominatur voluntas et non lex*. The case of Prohibitions (1607) decided that the King cannot refuse the use of his name in criminal cases, and *Chubb's case*⁴ shows that the

¹ Liebermann, 492, 493.

² Westminster Gazette, Dec. 21, 1909.

³ 43 L. T., 83.

⁴ "De Corona" is the title of Bracton's Book III. relating to such matters.

Crown must submit to the authority of the Courts when putting forward a claim. As early as the thirteenth century the personality of the Monarch was entirely shrouded from the constitutional arena, for when it was held that the King could do no wrong he was formally eliminated from the Executive.

A concrete result of the establishment of that principle was the opinion tendered by Markham, C.J., to Edward IV., to the effect that the King could not arrest on suspicion because he could not be held responsible for illegal arrest.¹

The King is eliminated from the Crown status by The Workmen's Compensation Act, 1906 (*see s. 9*).² The action of the King which in legislation is presumed to have been purely notional since the year 1707 is now presumed to be notional in most acts of Government. The author, however, ventures to question the suggestion that in no circumstances would the King be lawfully entitled to resume active participation in certain constitutional duties, should his intervention become a vital necessity to the State. Even the outer circles of the Crown are beginning to show a tendency to lose their identity, and to coalesce with the nation, for there are now certain public bodies which partake of the nature of the Crown and of public statutory bodies.³ The replacing of the word "King" in constitutional matters by the word "Crown" for an ever increasing number of purposes tends to corroborate the view that it has ever been the Crown which enveloped the sovereign, and not the converse. The evidence is *a posteriori*, but it is suggested that recent developments are only a continuation of earlier principles.

¹ See 25 L. Q. R., 296.

² This section illustrates an important principle, that the King, *qua* individual, is even more carefully guarded than "the State" itself, for constitutional immunities adhere more strongly to the Monarch than they do to the rest of the Executive.

³ Hallam, H. E., i, 385.

To attribute to a man with defined and limited powers immortality, perfection, and omniscience is a fundamental error which time exposes. The King was not, but the Executive, for practical purposes, perhaps was a corporation, although without definite corporate consciousness. When the King was an infant the vacancy in the Executive was soon filled up.

No doubt a perception of the Monarch's limitations by many early jurists compelled them to set up as the symbol of the Executive the Crown of the King. The Crown possessed no corporeal dimensions or limitations, and could reasonably enough be said to symbolize the essential attributes of sovereign authority, whereas many of the constitutional powers and attributes of the Monarch do not coincide with those of the Executive.

In the Rolls of Parliament¹ the Commons rise to full appreciation of the fact that the Crown is the property of the nation in a much more accurate sense than it could be said to be the property of the King. We find them complaining that the appeal which Richard II. made to the Pope to confirm certain statutes, was against the Crown of the King and the dignity and liberties of the kingdom. After all, this fact was not a new one, though it lacked frequent advocacy in those early days when words were the prerogative of clerics and the discontent of the laymen found its sole expression in action. Surely, when reviewing the history of our constitution we are bound to interpret actions as well as words?

The King, it is true, is said to have a political capacity which absorbs his personal capacity.² To the former are attributed many fictitious powers which did not belong to the King at all, or which could only be exercised by him in conjunction with others. It is largely expansion by theory. This fictitious King did a great many things which the occupant of the throne of England had not the power

¹ Hallam, H.E., iii., 419 (27).

² Willion v. Barkeley, Plow. 223.

to do, but which are within the authority of the Crown as symbolizing the Executive. In our investigations into the part played by the King in the Executive, we shall pay attention to facts, where fact and fiction are found to contradict one another. "The Crown," says Sir Frederick Pollock, "was not said to be a corporation at a time when the King's peace died with him."¹ No ; used in that sense it perhaps means the King, but if used to signify the Executive it symbolizes a function which was itself necessarily perpetual and perpetually demanded execution. The Executive, in effect, was a corporation. The writer has taken the liberty of applying appropriate modern descriptions to early institutions which existed only in crude or innominate forms, as this is a practice which has been adopted by other writers, including many of the highest eminence. The constitutional machinery was continuous in its operation, but the civilian jurists tried to disorganise it by making it dependent upon the King for its motive power. When the King died the King's peace was administered by the justiciar and even by the King's eldest son as lord. This notion of a perpetual peace executive is noticed by Stubbs, by Sir Frederick Pollock and Maitland, and by Sir William Anson.² No doubt the national machinery had been much disorganised and discredited by the tendency to enlarge the King's peace, for it is stated that 'every man that could, forthwith robbed another' on the King's death.³ The question of the Peace Jurisdiction is discussed later.⁴ Moreover, the Crown had other duties than the preservation of the peace. The revenues, including the contributions from the *terræ regis*, had to be collected, and justice could not be withheld. Before the thirteenth century the King had to be chosen or crowned in order to acquire the rights of the office. He was then an intermittent member of a perpetual executive. When

¹ First Book of Jurisprudence, 113.

² Law and Custom of Constitution, vol. ii., part i., p. 227.

³ Eng. Chron., anno 1135.

⁴ p. 78, *post*.

jurists realised that government must be a continuous function they were compelled to think and say, "The King is dead, long live the King." Maitland declared that the Roman lawyers made the King almost everything, which in fact made him nothing less than a corporation sole, though the expression "Corporation sole" was not used in English law until the sixteenth century. They had realised the limitations of the Monarch and were endeavouring to create his so-called juristic capacity in order to avoid the necessity of admitting the deficiencies of his personal capacity.

"The metaphysical kingship, the corporation sole, does not yet exist; the difficulties which are met with by his creation are only beginning to arise."¹ The statement is made with reference to the Anglo-Saxon kingship. A kingship may, however, be metaphysical although it does not possess the attributes of a corporation sole. All that is required for the purpose is a divergence between actual and theoretical jurisdiction. This is inevitable at any time, but it was increased before the Conquest, when the ecclesiastics imported the Roman civil and canonical jurisprudence, and the King adopted such titles as *Rex*, *Imperator*, *Casere*, *Basileus totius Britanniae* or *totius Albionis*.² He then and there acquired an imperial character in theory. In point of fact we read "The King, then, who crowns the fabric of the State is neither a mere ornamental appendage nor a ruler after the imperial model. He is not the supreme landowner, for he cannot, without the consent of the Witan, add a portion of the public land to his own demesne. He requires their consent for legislation or taxation, for the determination of peace and war, &c."³ At the same time, as Sir Frederick Pollock and Maitland pointed out, he was not in Saxon times the corporation sole which he was alleged later on to be. But putting on one side imperial pretensions, was he ever as "King" a consistent character? Stubbs discusses the

¹ P. & M., i., 512.

² Taswell-Langmead, 22.

³ Stubbs, C. H., i., 158.

meaning of the word in his "Constitutional History." It is by no means certain that we are acquainted with the true derivation and original import of the word, or understand, even approximately, what jurisdiction it was supposed to implicate. If it was an elastic term which expressed a mere relationship, such as the "father of a family," of course no inconsistencies can exist, but if it implied anything corresponding to the entire executive office then we search for inconsistencies with great expectations. On the other hand, if the monarchy possessed no very definite *a priori* status, then researches into this branch of the subject becomes superfluous. In either case it becomes apparent that the Executive was a mixed or co-operative office in Anglo-Saxon times.

It has been too much the fashion to assume that there were no theories in the Germanic system of government as modified and carried out in this country prior to the Conquest, and to regard the Roman jurisprudence as the only source from whence in mediæval times theories were derivable. Theory exists *in posse* wherever practice is sufficiently clear for definition, whether it be at the time defined in terms or not. The broad lines of Germanic government can be plainly discovered, and shown to embody intelligible principles, and the changes which it underwent in this country between the eighth and eleventh centuries do not obscure those principles. Undoubtedly our Anglo-Saxon forefathers possessed a positive, though somewhat loose jurisprudence. Mr. Adams is of opinion that there is more philosophy to be extracted from the Germanic practice of placing the administration of the law in the hands of popular assemblies, and its subsequent evolutions, than there is from Roman jurisprudence.¹ Bagehot is one of the first formally to discriminate between the real and the metaphysical kingship, and President Lowell defines the kingship as a political

¹ See Essays in Anglo-Saxon Law, I.

force, as a social and moral force, and as a pageant.¹ He also prefers to treat the King and not the Crown as the *symbol* of government. From this notion the author respectfully ventures to differ.

Commenting on the conscientious labours of the late Dr. Stubbs, M. Petit-Dutaillis says that "The French, who have kept the 'classical' spirit and reserve their full admiration for that which is perfectly clear, will doubtless find that his thought is very often obscure and his conclusions undecided. This is really one result of the vast erudition and the good faith of the author. This honest historian is so careful not to neglect any document, so impressed with the complexity of the phenomena, that he does not always succeed in disposing them in an absolutely coherent synthesis." Could the weakness in the civilian theories relating to English kingship be more completely exposed? It is the 'classical' theorists who have deluded us into the belief that the King is coterminous with the Executive, and it is Stubbs and other modern jurists who have cleared away the 'coherent syntheses' which have hitherto fettered our minds, and who have extracted principles more in accordance with the facts. It will surely be time to replace facts with theories, more or less corresponding to them, when English jurisprudence becomes a 'classic' for some new race to study.

Sooner or later we must appreciate the fact of the continuous existence of a national executive authority, and turn the stream of our incredulity upon those "classical" jurists who attempted to replace the national practice with legal theory. We may decide to call it the 'Executive,' the 'Crown,' or, as Maitland suggested, the 'Commonwealth,'² but we cannot refuse it recognition.

But let us not do the classical jurists an injustice. We must put something to their credit. They did not *intend* to create empty theory. Their aim, in which they failed, was to give the King absolute authority. They brought

¹ Government of England, 1-48.

² L. Q. R., xvii., 140.

from Rome the *Lex Regia*, and transformed it into the ecclesiastical kingship—a niche in the Roman ecclesiastical philosophy. It was turned back from our shores, but its spirit was left behind, and more than once has the attempt been made to reincarnate it. The theory has continued to exercise a great deal of influence, and later generations have joined in the hopeless attempt to preserve it. The fiction certainly has produced metaphysical results of a beneficial character which constitute its true *raison d'être*. It then provided the nation, as it now does¹ the empire at large, with a vivid central idea, which strengthened and gave tone to the constitution and greatly aided its development. It also provided the nation with a nominee through whom the business could be transacted, and who could take proceedings in its behalf, or, at least, lend his name for the purpose. This proved a great convenience in early times as a means of expressing or parading the national entity. It did more. It set up definitely the notion of dependence in government. The Germanic practice tended too much in the direction of independence. These two complementary ideals, working together in our institutions, have produced a national rule, the rule of authority, which, transcending the power of the King, invests in constitutional forms a spirit of inter-dependence which is the peculiar glory of the English political system. Sir William Anson² calls the view that the King is the mere exponent of the wishes of the nation a Puritan notion, and suggests that the notion of the Divine Right of Kings grew up in opposition to it. It is urged, however, that the two aspects of kingship come, in substance, from the Germanic practice and Roman theory,³ and that the conflict which in the seventeenth century occurred between them was designed to determine their respective spheres of influence in the English governmental system.

¹ Lowell, i, 51.

² Parliament, 30.

³ *Nostra autem divina constitutio, quam semper promulgavimus, &c.* (Justinian, Institutes, Bk. ii., title 6). *Constitutio divæ memoriae Zenonis, &c.* (ibid).

CHAPTER VIII.

"KING" OR "CROWN"

PART I.

FACTS are more permanent in their influence on history than theories, and it is more interesting and practicable to understand what were the real powers of the King, and where the executive authority was actually reposed, than to know what mediæval jurists thought about such matters. Bracton says that those things which are of jurisdiction and peace, and those things which are annexed to justice and to peace, pertain to nobody except to the Crown, nor can they be separated from the Crown, since they constitute the Crown itself. He says, further, that the Crown of the King is to dispense justice and judgment and to keep the peace.¹ The Crown, according to Calvin's case,² is an hieroglyphic of the laws where justice, &c., is administered. It signifies to do justice and judgment; to maintain the peace of the land; to separate right from wrong. These matters, Sir Edward Coke there suggests, are referable to the body of the King. From one limited point of view, *i.e.*, allegiance, they are, but as has been observed, they have depended not infrequently upon some other substantive *personnel* for their execution. They are more truly referable to all those officers who possess substantive authority to attend to them.

In Jacob's Law Dictionary (Second Edition) and in Wharton's Law Lexicon (Tenth Edition) "the Crown" is said to include, besides the Sovereign, the following—his

¹ Bk. ii., ch. 24, s. 2.

² 7 Rep. 19, 20.

possessions and dignity, and the rights, duties, and prerogatives belonging to his crown. All of these will at times be found straying outside the sphere of kingly authority and into the larger realm of the executive. They constitute State rights and State property. The limits of the King's power were discernible even in matters which concern the bare exercise of authority. Where authority was connected with proprietary interests the restrictions were more extensive and more general.

For instance, Staundford¹ speaks of the temporalities which the King hath *in iure corone*. Bracton² distinguishes between property which the King cannot dispose of, *e.g.*, property of the public treasury, and other property, such as treasure trove, which appertains to the Crown on account of the King's privilege, and which may be transferred because it does not affect the common interest. Matters of the former class *faciunt ipsam coronam*. Sir Edward Coke says that the Crown and the lands whereof the King is seized *in iure corone* are *concomitantia*.³

The general tenor of the references to these matters in the Rolls of Parliament, particularly in the thirteenth and fourteenth centuries, suggest that they belonged to the personal Monarch. See Vol. i., 97, where we read that the custody of manors, &c., *ut de iure corone et ratione prerogative et dignitatis suae ad ipsum dominum regem et non ad alium pertineat*. In Vol. iii., 356 (43) we get *Domini Regis Regalia et eius prerogativa in omnibus semper salvis*. These are merely instances. There are many others of a similar character. Against this assumption it can be urged that legal theory was probably at variance with facts in those days as it is to-day. Moreover, the replies to petitions frequently saved not only the prerogatives of the King but also the Common Law and good customs of the land,⁴ which presumably included the practices of the constitution. Occasionally

¹ *De Prerogativa Regis*, ff. 7, 8.

² Bk. ii., ch. 5, §. 7.

³ Co. Litt., 15b.

⁴ liii., 61 (27).

the Great Charter is saved and the law of the land, and, in Vol. iii., p. 476, the King wishes to save his executive prerogative of mercy, but wishes to exercise it on good advice. The use of the impersonal "We" in the Charters of Richard I., noticed by Stubbs,¹ and the "We" and "Our" in the Charters of 9 Henry III., confirmed in 8 & 20 Edward I., suggest either plurality or sheer representation. The Statute of Treasons of Edward III. recognised other officers besides the King whose safety was essential to the State, *e.g.*, the Chancellor, Treasurer, and King's Justices being in their places and doing their offices. The statute also protected the Great Seal.

Then, too, the Crown is not the only symbol of office. Edward the Confessor made a special seal for the kingly office. As early as Henry III. the Privy Seal was introduced to encumber the action of the King and to ensure the due performance of State duties. It was intended to act as a restraint upon the use of the Great Seal, and the Chancellor ceased to take his instructions direct from the King.² By Richard II. the Privy Signet had created a further intervention. By Henry VI. we find the sign manual in use and the Privy Signet one remove from the King.³

One other formality grew up to encumber the royal action, namely, the necessity of documentary process for declaring the King's will, which Palgrave notices in his "Dissertation upon the King's Council." It was especially necessary when the command was to go to a distant shire. This did not, in any way, ostensibly restrict the King's powers. On the other hand, it actually tended to produce that result *pro tanto*, for it tended to stereotype executive action. It also necessitated the appointment of officials, such as the Chancellor and the King's Secretaries, who in course of time acquired thereby substantive powers of their own.

¹ C. H., i., 603.

² Pike, Public Records and the Constitution, pp. 24, 25.

³ As to the obscure history of royal seals before the Conquest, see Hall's "Studies in English Official Historical Documents," p. 166 *seq.*

The presence of the King as representative of the Executive gave him peculiar influence and a great status in the Council Chamber and in Parliament. Hence the Council is called the 'Crown in Council,' and Parliament, the creative body, is called the 'Crown in Parliament.'

The Executive, as its importance increased, became the legal entity of the State and became prerogative. The King, as representing the Executive in Council and in Parliament, probably proclaimed decisions and announced the laws. The potency of the Executive mated with the deliberative in creative work and vitalised it, and in time the King was said to "enact." Chitty treats the kingship as an executive office, and says¹ that his participation in legislation was necessary in order to prevent the executive office being unduly encroached upon. He also argues (reverting to the original conception of kingship as a magistracy simply) that the King should not, and except in the case of certain arbitrary Kings did not, recommend legislation, but simply retained the right to veto it. He denies that the King is *caput, principium, et finis* of Parliament, but accepts the conventional point of view in regard to the "enacting" process. The case of Proclamations² also shows that the King as executive officer can only declare old laws. Sir Edward Coke recognised the right of the King to have statutes submitted to him. In Co. Litt., 90 b, we read that "prerogative" originally meant asking the consent of the King to Acts of Parliament, and the numerous reservations of the prerogatives in the Rolls of Parliament, especially the earlier ones, support Mr. Chitty's notion that the King acted on behalf of the State Executive and as its guardian.

The prerogative movement was in its inception an effort to secure to the legal entity of the nation (*i.e.*, the Executive) that consideration to which it was entitled for maintaining its integrity and for giving a preference to the interests

¹ Prerogatives of the Crown, .

² 12 Rep. 76.

of the community over those of the individual. The principle was subscribed to by those who legislated and those who administered the laws in the Courts. In order to effect the object two things were necessary, namely (1) the position of the Crown had always to be borne in mind by legislators and judges, and (2) matters which involved the Crown had to be referred to the Crown for its views and recommendations.

The co-operation of the Crown was sought and was tendered nominally as expert advice, though in point of fact it was given in a much more masterful form. Sir Edward Coke omits all reference to the Courts in his definition of "prerogative."

The definition is also defective at the present day owing to the fact that the word has now acquired a number of secondary meanings. It is applied to (1) the right to receive special consideration; (2) the method in which the rights of the Crown were brought under consideration and defined (the one in Sir Edward Coke's mind); (3) the decisions or rules of law which have been accumulated upon the subject; (4) the various subject-matter to which those decisions relate; and (5) the King (*scil.*, Crown), *e.g.*, the King is 'prerogative.' Sir Edward Coke proceeds to draw a distinction between the King and the Executive for he goes on to say that legally the prerogatives extend to all the powers, rights, &c., which the law gives to the Crown. Gneist, on the other hand, says that the King "enacts." Brydall¹ says that in legislation the act of the King alone is *jussive*, and Sir Christopher Hatton states² that all Acts of Parliament are agreed upon by the King, Lords Spiritual and Temporal, and Commons, and take strength by the Royal Assent. This is a very imposing theory, but when we follow the executive function into the Council Chamber and Parliament, we shall find that it has not made co-operation any less necessary, and many valid laws have been made without the King's consent.

¹ *Iura Coronæ* (1680).

² *Treatise on Statutes* (1677).

There are certain constitutional activities which, although recurrent and effective in their operation, are not admitted to be valid. They are frequently concerned with the administration of the laws and constitution without or adversely to royal co-operation in cases when no King exists or a Monarch fails to play his part. Righteous indignation applies to them the term "non-legal" or "revolutionary." Expediency meets their claims with a judicious repudiation in order that they may not acquire the force of precedents, or subvert the accepted routine of the constitution. The existence of this emergency authority was contended for by the Privy Council of Queen Elizabeth, but as a royal and not as a national prerogative.¹

"The King," says Stubbs, "is not an estate; he is supreme in idea if not in practice." In early times he was one of the Great Men of the realm, a group of people whose successors, roughly speaking, afterwards became the second estate. In the latter capacity he entered into deliberative work. At the present time he is at most a purely honorary member of the second estate, his executive office, which has acquired an impersonal character, necessitating his abstention from participation in matters of a controversial nature. In his executive capacity, he clearly cannot, it is submitted, have been intended to enter into deliberative work, but in that capacity he nominally enters largely into the legal status which belongs to the Executive, to which, as the legal entity of the nation the prerogatives attach. Constitutionally the Executive is subrogate because it carries out instructions. Legally it is prerogative because it is the legal entity of the nation.

¹ p. 2.

CHAPTER IX.

“ KING ” OR “ CROWN ”

PART II.

AN ATTEMPT will now be made to examine in further detail the constitution of the Executive, and to notice the part played by the King and other executive officers therein. The essential difference which exists between purely executive work on the one hand and judicial work on the other will be pointed out, and it will be shown that the discretionary nature of judicial work and the intervention of proprietary questions in the working of the Exchequer considerably affect the distribution of jurisdiction.

The word “ Crown ” appears in the Anglo-Saxon laws of Edward the Confessor, as given by Liebermann,¹ but those laws are supposed to have been compiled after the Conquest. Maitland in his “ Domesday Book and Beyond ”² applies the idea to pre-Norman times. He says that in 904 King Edward gave the immunities enjoyed by Crown lands to lands which that King had given to the Bishop of Winchester, by which the learned author, in effect, ante-dates the use of the word “ Crown ” by applying it to the state of facts existing in Anglo-Saxon times. The terms of Edward’s Charter just alluded to would seem actually to embody the word “ Crown,” for it runs as follows :—

¹ Gneist, 541.² pp. 635, 659.³ pp. 276, 277.

" I have granted Christ that the men of the bishops, noble as well as non-noble, living on the said land shall be worthy of the same right as is enjoyed by those who dwell on the demesnes of the Crown, &c."

One would infer from the appearance of the word " Crown " in the charter that it was in use even in Saxon times, but Maitland warns us that we must be wary of forgeries when seeking to attach a definite value to some of these alleged ancient charters.

Freeman draws a distinction between the King and Crown of Saxon times in his *Norman Conquest*,¹ where he speaks of the election of the King, and says that there is no trace of the nomination of the Crown by the Witan. Hale speaks of the possessions of the Crown in the time of Edward the Confessor, and intensifies the idea by references to the resumption of the same by William I.² Reeves³ says that William attempted to add the strict power of the feudal law to the office of kingship. On the other hand, William introduced, or at least confirmed, the Crown as the symbol of authority. It is not at all surprising, for William was a usurper, and naturally he might have preferred on occasion to lay greater stress upon a native function than upon an alien functionary. This King ordered that peace and concord and justice, which pertain to the Crown and to the dignity &c., of the realm, be observed. Barrington speaks of the prerogatives given to the King by the French law and to the Crown by the law of England.⁴

It is impossible to read such passages as these without realising that the Crown was being set up as the symbol of authority, as a more effective and loftier conception than the personality of the Monarch. The distinction between King and Crown is well brought out by Edward I., when he swore not to alienate the right of the Crown.

¹ i., 102, 103.

² H. C. L.,

³ H. E. L., i., 241.

⁴ *Ancient Statutes*, p.

In the Rolls of Parliament for 1293 (i. 97) we find a certain individual getting into trouble for summoning a member of the King's household. A fine of one thousand pounds was imposed for contempt of the King and of the privilege and dignity of his Crown. Here is a separation of the two ideas. Although they are evenly balanced in this passage, it is impossible to miss the suggestion that the Crown is at least a co-ordinate status. It may be urged that they were identical. It can be demonstrated that they were not, provided the expression "Crown" be regarded as synonymous with the expression "the Executive." Even the Crown itself was to some extent less than the Executive authority, for the Kings of England in mediæval times were compelled to assent to the jurisdiction of the Church of Rome in many matters in exchange for the support of the latter in matters which the Church graciously conceded to be of a secular character.

The distinction between the King as a feudal superior and the political crown is noticed in Stubbs¹ in the following phrase:—"Throughout this struggle it may fairly be said that, although . . . the Kings pressed their hold on the great vassals to an undue extent, the interests of the Crown and the people were one." Truly the relation between King and vassal was a personal one, but that between people and King was an official one only. Fortescue speaks of the kingship as an "office."

"For though his estate be the highest in the estate temporal in the earth—yet it is an office in which he ministreth in his realm defence and justice."²

The strict nature of the office is demonstrated on p. 39 (*ibid*), where Fortescue declares that power to do wrong, *e.g.*, to misapply his ordinary expenditure, &c., is not a power, but impotence; so to say that the King may not do these things is not to restrict his power. Rules upon

¹ Select Charters, p. 16.

² Monarchy, 55.

these points therefore are not rules against the prerogatives. The official nature of the post was made plain by the Act of the Convention Parliament which gave the Crown to William and Mary.¹

Speaking of the King's Court in Norman times, Mr. Pike² uses, and, in effect, justifies the use of the symbolic "Crown" as the proper terminology to apply to the Executive. He says "The King's Court consisted of tenants holding *in capite* of the King, as of his Crown." Later³ Mr. Pike says that the *tenants in capite* constituted with the King the highest Court of Justice in the realm, which means a co-operative function so far as the administration of justice is concerned. Mr. Carter notices the fact that the King's Court took cognizance of "Placita Coronæ."⁴

Towards the latter end of the Norman period, the power of the Justiciar, who was perhaps the King's Agent, was broken, and the *Aula Regis*, which before was one body, and over which he had presided, was divided into four distinct courts. The Chancellor had the Great Seal before the Courts were broken up. He was the foot and basis of the civil, as the King's Bench was of the criminal jurisdiction.⁵

Stubbs notices that there was a difference in the methods by which the creative and the executive business of the kingdom were transacted. He draws the following distinction. The King acted with his Great Council and through his permanent (or Privy) Council.⁶ Administrative duties were apparently divided between the two bodies. The opinion has already been expressed that the King acted with others in the process of deliberation, and alone, so far as his own personal duties were concerned, in the act of performance.

¹ Anson, Parliament, 39. ² P. R. & C., i. ³ *Ibid*, p. 3. ⁴ Legal History, 45.

⁵ Gilbert, Court of Exchequer, 6.

⁶ C. H., ii, 272.

In the thirteenth century Bracton made the first grand survey of the laws and constitution of England. It is necessary, therefore, to pay special attention to what he says. The general principle of co-operation is roundly stated by Bracton to exist¹ somewhat as follows:—"Likewise he has his court, namely counts, barons, because the counts are so called as being as it were *associates* (*socii*) of the King, and therefore, if the King be without a bridle, that is without law, they ought to put a bridle upon him."² This clearly refers to executive as well as to legislative duties.

The distinction between the royal and the constitutional position of the King is alluded to by Stubbs in his survey of the status of Edward I. Speaking of the large amount of work which Edward did in judicial matters, that learned author declared that in the circle which surrounded the King, Edward found "his royal as contrasted with his constitutional position; in other words, he organised the powers of his prerogative, the *residuum* of that royal omnipotence, which, since the days of the Conquest, had been limited on all sides by the national growth, and by the restrictions imposed by routine law, policy, and patriotic statesmanship." Much executive work is, it will be seen, included in this statement, and therefore with an extension of the *personnel* of the Executive, the interests, rights, and prerogatives involved in the transfer must also go.

The royal control over matters in general must have been very uncertain at times, for in the reign of Edward III. we actually find a statute ordering the King's butlers not to take more wine than was wanted for the requirements of the royal table.³

¹ Bk. ii., ch. 16, s. 3.

² Bracton would, presumably, not assent to the formula "God the only Ruler of princes," an antiquated fragment of Roman ecclesiastical philosophy which still finds a place in the Prayer Book of the Established Church of England.

³ 25 Ed. III., c. 21.

In the reign of Edward II. the De Spensers attempted to discriminate legally between the King and "Crown," asserting that allegiance was due to the latter, and this attempt is strongly condemned by Sir Edward Coke in *Calvin's Case*, where he asserts the personal claims of the occupant of the throne.

According to the statute 2 Henry VII., c. 1, the actual occupant of the throne is the one to whom obedience is due. This statute, passed to ensure the peace of the realm, makes it very clear that there is no power or right in all the ordinary routine of the constitution to withdraw from the person of the Monarch due recognition of his inseparable association with the Crown.

CHAPTER X.

EXECUTIVE OFFICERS

THE EXECUTIVE in its widest sense included in mediæval times not only simple executive matters, such as the issuing of commands, the appointment of officers, and preservation of the peace, but also the administration of justice and finance. The two latter were not purely executive matters, for the administration of justice is a discretionary function, and finance includes large proprietary questions upon which others, besides the King, who were co-trustees with him of the national resources, had much to say. It is proposed now briefly to discuss the *personnel* engaged in the exercise of these functions, calling in aid what has already been said concerning them in the earlier part of this book in which the functions of government were reviewed more broadly and generally.

All commands were issued in the name of the King, except in those cases in which they emanated from some minor jurisdiction, such as a Marcher lordship or a Viscounty, which held pleas of its own within its own borders.

The executive command retained its personal character long after particular commands ceased to be issued by the King, except in theory, and right down to the reign of Edward VI. suits were dissolved by the death of the King who had commanded the presence of the party. Summonses to attend Councils and Parliament abated in the same way until a still later period. Appointments to office were still made ostensibly by the King. These lapsed when the

King died. These are matters in which the purely theoretical notions, tacked on to the office of the principal executive officer, produced tangible results in government.

Where a summons did not issue under the King's but under other, *e.g.*, legislative, authority, the lapse is not so much an evidence of the power of the King as of a defect in the rules relating to the Executive, which, but for the impressive force of the kingly theory, would have been remedied in the self-same legislation. The appointment to office must be distinguished from the creation of office, and of its functions. The latter was administrative work, which, as the ordinances and Acts of Parliament show, was performed by the King in consultation. Chitty in his 'Prerogatives of the Crown' calls the King the fountain of office, but the notion is surely incorrect. No original work, it would seem, which is essentially deliberative in character, fell within the authority of the King. The true conception, as has already been urged, is that the King's sole authority extended in quite a minor degree to constructive work which involved deliberation and the exercise of discretion.

Assuming that the King exercised considerable powers in the appointment of "royal" officials, it will be interesting to consider whether at all, and if so, to what extent, the bare obligation of office gave to a "royal" officer, when appointed, a substantive or *quasi-substantive* status. Professor Vinogradoff has been good enough to give the writer his opinion as to the position of the sheriff, whom he considers to have been simply an agent of the King. Other very learned authors hold that much of the work done by officials in the King's name, before the fourteenth century, may be regarded as having been done by the King's agents, and that in such cases it is unnecessary to employ the imagination to extend the personal King into a juristic personage with elastic authority.¹ When, how-

¹ P. & M., i, 512.

ever, the sheriff, or any other official whatsoever, acted under a direction made by the Council, he would presumably have been something more than that. He would either be exercising some new power not deputed to him by the King, or he would be executing an old power under a superior sanction. The King's appointments, moreover, were only made by him in an *official* capacity, and were therefore quite unlike appointments made by a business man who is the owner of a voluntary and proprietary concern. *Rex datur propter regnum et non regnum propter regem.*¹ *Rex nihil potest nisi quod iure potest.* Hallam² supports the following opinion expressed by Hooker in his 'Ecclesiastical Polity': 'The whole body politic maketh laws, which laws give power unto the King; and the King having bound himself to use according to law that power, it so falleth out that the execution of the one is accomplished by the other.' In Stubbs³ there is an interesting account of the devolution of some of what he calls the Monarch's⁴ judicial powers upon the itinerary justices, and of the gradual exhaustion of the King's participation in certain of the duties.

The Malaysians believe in the notion that the sovereign authority resides in other officers besides the King.⁵ There is often a superior wisdom in children, whose judgments are not warped by fictions, which enables them to interpret realities more faithfully than the learned, whose knowledge is liable sometimes to shape a world within the mind which does not correspond with the world around them.

The earldorman, like the sheriff, received his office from the hand of the King after England became a united country, but his office was one not of service; it was one of command. This great officer's power was more ancient than the King's, and the King did not either create the

¹ Fortescue, *Monarchy*, 55.

² H. E., i., 222.

³ *Select Charters*, p. 140.

⁴ But see p. 82 *seq.*, *post.*

⁵ Frazer, *History of Kingship*, 121.

office or confer the power.¹ The public constitution determined the earldorman's authority, and not the King's pleasure. He received it from the King as the King received his from the Witan. Maitland tells us that some offices were held in Saxon times by right, and that Harold would not have been able to treat the sons of Ælfgar as removable officers.² Some earls even held official property as well as private property. That the King was bound to appoint officers in a proper manner is suggested from the direction in 14 Ed. III., c. 7, that sheriffs should be appointed each year by the Chancellor and other officers, because the King had granted them too long a tenure of office.

King Edward commanded the officers of the law to do justice impartially.³ In doing so he did nothing more than his duty. The command was an executive act. He was not creating any new obligation for them, nor was he in any way adding to their powers. The organisation for the district, the County Court, owed none of its jurisdiction to the King. The Kentish laws of Wihtraed passed at the end of the seventh century by an assembly of Great Men, including the King, show that the shire-reeve was already presiding at the District Court,⁴ but when King Alfred speaks of complaints having been brought in the folk-moot before the King's reeve, it did not mean that the sheriff was judge. He was merely present as the King's representative.

Mr. Adams says⁵ that the King had no judicial powers separate from those exercisable by the court in which he sat. He was, it is suggested, simply a presiding officer, with executive powers to supervise the action of the judges, and to carry out its decrees. The King's decision alone was not binding, unless he was accepted as arbitrator.⁶ Mr.

¹ Adams, *Essays in Anglo-Saxon Law*, 21.

² *Domesday Book and Beyond*, 168.

³ Liebermann, 139.

⁴ *Essays in Anglo-Saxon Law*, 9.

⁵ *Ibid.*, p. 24.

⁶ *Ibid.*, p. 355.

Adams sets forth an account of a dispute which occurred at the end of the tenth century with reference to some land. The defendant Leofwine refused to accept the decision of the King, and insisted upon his right to have a legal decision in the Shire-Gemot—the King accordingly sent the case to the Shire Court. No appeal to the King lay from a bad, if honest decision. In Asser's life of Alfred it appears that Alfred threatened to remove the sheriffs and earldormen for incorrect decisions, but did not attempt to reverse their decisions.¹ The King was not *qua* representative of the Executive a judicial officer. It must be remembered, however, that the King was an administrator, *i.e.*, one of the Great Men, as well as an executive officer. In the former capacity he could deliberate in a court of justice. The Executive capacity, however, extinguished the deliberative, by reason of its more unique and pressing claims.

Edward the Elder commands the officers of the law to do justice impartially, which suggests that a judge enjoyed substantive functions so long as he remained in office.² Cnut at the beginning of his secular laws makes an appeal to the judges. He says, let him who has power of judgment very earnestly bear in mind what he himself desires when he thus says: "*Et dimitta nobis debita nostra, sicut nos debeamus.*"

In Henry III., the King, prelates, earls, barons, and council enjoin proper procedure on the sheriffs in taking indictments.³

In 1 *Show. 117 sqq.*, the question of the obligation of judges to exercise their powers freely and without pressure is argued at length, and in a convincing manner. Britton, which by many is presumed to be an effort at Codification made by Edward I., says⁴ that sheriffs are to swear to the justices in Eyre⁵ to execute the lawful commands of the

¹ p. 25, *ibid.*

² Liebermann, 139.

³ See Stat. West II., c. 13.

⁴ Britton (Nicholls), i., 21.

⁵ Stubbs, C. H., i., 164; I, 280; I, 321; II, 18n.

justices, *i.e.*, their judgments. This is, of course, an executive duty. If the justices' duties were prescribed in the usual way by the King in Council, and the sheriffs were to execute their commands, the sheriffs would be acting pursuant to an authority greater than that of the King. It is true that on p. 2 "Britton" suggests that the King delegated the judicial functions personally, but that, if correct at all, would be done by the King as an executive act in pursuance of the ordinance (if any) creating the justices in Eyre and not in the plenitude of original jurisdiction.

Many of the coronation oaths of our Kings have been promises rather to enjoin obedience to the laws and to see that the laws were observed than to carry them out personally.¹ This suggests oversight of the administrative function. These promises, says Stubbs, were of value as testifying the King's duty and the nation's rights.² Officers were to be free from interference by the King so long as they performed their offices faithfully according to law. The same feature is noticeable in the present form of oath.³

The nation was just as much entitled to the independence of its judges and the purity of its judgments as it was to the faithful performance of whatever duties fell to the King. The King's position was not in any way exceptional from that of other offices, nor did the King's authority act as a commutator to create a break in the national administration.

It becomes more interesting to speculate whether the oath of allegiance rendered to the King in his official capacity did not bind an officer to perform his duty as to the State. Certainly officers could from early times be called to account by impeachment or otherwise for breach of duty, and the King's command could not excuse a

¹ C. H., i., 323.

² Anson, L. & C. C., Vol. ii., pt. i, p. 236.

³ See R. v. Feather, 1855, 6 B & S., 257.

wrongful act.¹ The King himself could be called to account and the action could be approved by the legal opinion of the day. The interest further increases when we find officials taking specific oaths of office, though to the King. 51 Henry III., the Statute de Scaccario, says that "the King commandeth the treasurer and barons of the exchequer by their allegiance and by the oath that they have made to him," &c. Oaths are administered to ensure fidelity in the administration of office.

So much for the officers of rank inferior to the King. What of the relation of the King himself to office? Bracton says that there is no King where the will rules, and not the law. If we suppose the King's 'associates' to correct him, and trouble follows, who has broken the peace of the kingdom? These questions arise in regard, for instance, to the deposition of Edward II. The feudal oath of the people to the King was a conditional oath.² Whether the political oath of allegiance contained an implied condition has been much debated.³ It is a first principle in every free State, as it was in Athens, that the King must act according to law. The name of Thesmothetes was not simply the name of a man, but a name that belonged to the State, and the bearer sank into the position of a private man if he failed to do his duty.⁴ However this matter may stand in regard to the King, there is nothing impossible in the notion of a vacant throne.⁵ No machinery exists in this country to deal with such emergencies as disputes with the Monarch. Such legal machinery is created only when there is a prospect of specific user.

¹ Am. & Eng. Ency. of Law, Vol. xxi., p. 774.

² See Stubbs, C. H., i., 331.

⁴ Pettingal, Juries, 15.

² Stubbs, C. H., i., 166, 167.

⁵ Anson, ii., pt. 2, p. 231.

CHAPTER XI.

CONCERNING THE PEACE FUNCTION

IT IS NOT necessary here to discuss questions of King's peace and folk's peace.¹ Co-operative peace jurisdictions of a minor sort were numerous in early times, and even as late as Bracton we read of the Viscontiel Peace.² There were also the Marcher Jurisdictions and those of the Counties palatine. These faded and disappeared, and the King's peace spread over the realm, but that other change to which we have already alluded went on, *viz.*, the central authority came more and more into the hands of the Permanent Council and the holders of substantive offices. Stubbs tells us that Edward I. acted through his Permanent Council. This means a very large measure of co-operation with the King in the execution of (*inter alia*) the peace function. The peace in the eleventh and twelfth centuries, as Sir Frederick Pollock reminds us, was formally associated with the name of the Monarch, but it is suggested that there was a growing tendency for the King to merge in the Crown.

In par. 8 of the Kentish Law of Hlothar and Eadric (seventh century) we read that an injured party could himself cite a defendant to the *Metel* (Court of Law), and that the defendant should give surety to the plaintiff to do him such right as the judges prescribed to him.³ Here peace functions are being exercised by private persons. Peace powers are also assumed to be in the complainant in the laws of Ine, pars. 8 and 75. In the eleventh and twelfth centuries the King's peace made great headway. Sir Frederick Pollock remarks that Pleas of the Crown were

See P. & M. i 44. 46.

² Bk. iii., ch. 35.

³ Adams, Anglo-Saxon Law, 8.

breaches of the King's peace.¹ The intimate association of the peace with the judicial office is clearly shown in that statement. Indeed, the first step in the preservation of the peace was the preparation of a list of the offences which infringed it. In Cnut's reign such a list was prepared by King and Witan.² It is interesting to observe, too, that the King's name is attached to the executive function (the King's peace), whilst the judicial function is identified with the Crown (Pleas of the Crown).

The peace jurisdiction brought the offender before the court, and, after the adjudication, executed the judgment.

The Royal Writ was an executive instrument. The Royal Inquest, when actually sitting, was judicial. We are told how the King's peace grew. It extended first to the King's servants and to offences committed on the highway. It was then utilised when an offender was too powerful to be tried in a local court. That is the principal explanation of its gradual extension. It was indispensable because it was the only executive which was thoroughly effective and could always be relied upon. The Viscontiel power possessed in theory both executive and judicial authority sufficient for the general administration of justice, but the executive power in special cases proved inadequate. In theory the peace could be preserved continuously, but in practice so much reliance had to be placed upon the national executive, which was without its nominee when the King died, that the local jurisdictions grew weak and disorganised through non-user, and it so happened as Sir Frederick Pollock reminds us, that on the death of the King "One man forthwith robbed another."³ An information for the King and a subject did not abate by the death of the King.⁴

Even the death of a sheriff could delay the administration of justice, for which reason any person selected for the office was obliged to accept it.⁵

¹ *Law Quarterly Review*, I, 37, *seq.*

² Liebermann, 309.

³ *See L. Q. R.*, 37, *seq.*

See Sheppard, Abridgt. of Com. Law & Stat. Law, pt. I, p. 2.

⁵ *2 T. R.*, 731.

On the death of Henry III., Edward being in Palestine, "the Great Men of the Realm by a wise audacity took upon them to issue a proclamation of the peace in the new King's name." Thereafter, every King was deemed to assume office immediately on the death of his predecessor. A valid convention made the new man King at once, even before the formality of coronation. In Glanville's day offences were not always charged against the King's peace.¹ In this function, too, the Crown begins to appear, for offences were sometimes said to be committed against the King's peace, his Crown, and dignity.² In 1195 a proclamation as to the preservation of the King's peace was issued by Archbishop Hubert as Chief Justice. The wording was taken largely from the Assize of Clarendon. Stubbs³ gives a short list of the various steps leading up to the appointment of the justices of the peace in the reign of Edward III. There is nothing in the history of this subject, so far as is known, to suggest that the King did not co-operate with his Council in creating and varying peace duties, though no doubt the actual ministerial work performed in pursuance of ordinances and assizes was carried out in the King's name alone.

A distinction between peace powers and judicial powers is to be gathered from *Groenvelt v. Burwell*.⁴ Holt, C.J., there says that the judicial power is the power to "examine, convict, and punish." It is suggested, however, that the sentence is carried out by the executive power.

We are here met with a confusion of terms. If the distinguished judge meant the adjudicatory or juridical function when he said "judicial," then he is right. The juridical power is the power to discriminate and decide. The other powers, *e.g.*, to compel attendance at court, to punish, &c., are peace powers. As the word judicial is used, it evidently includes executive as well as juridical

¹ P. & M., i., 464.

² *Ibid.* i., 525.

³ *Select Charters*, p. 263.

⁴ 1 Salk., 396.

powers. It is a blend of the two functions. When the writer speaks of juridical powers he alludes to the deliberative act, which is an administrative function and not an executive duty. It might perhaps be contended that this line of argument must lead one logically to hold that the juridical function is purely a metaphysical one, and requires the co-operation of the Executive even to declare its own thoughts in such a way as to give them official sanction. This is no doubt true. A judge in hearing and deciding a case acts in a dual capacity without a doubt, but the writer wishes to prove that the presence of the deliberative duty wherever it is found ousts the claims of the executive to sole authority and makes the act in question, mixed function though it be, a co-operative one.

The power to arrest for crime is still a co-operative function, for in certain cases the ordinary citizen is not only entitled, but is legally bound to arrest offenders. He is also sometimes entitled to prevent crimes, and to use force for the purpose. He is likewise bound, under the Common Law, to report all felonies which come to his notice. The right of a subject to apply for an information is also a co-operative peace function.

CHAPTER XII.

CONCERNING THE JURIDICAL FUNCTION AND THE ADMINISTRATION OF CROWN PROPERTY

THE CO-OPERATIVE nature of the juridical function has already been partially considered. The Folk-moots, the Courts of the hundred, the borough, and the shire, and those institutions upon which trial by jury is founded, had descended from that distant age when the name and office of King were alike unknown to the rough German.¹ The defects in these inferior tribunals were remedied later by that sovereign prerogative which had been given to him for the common weal,² and from Norman times we find the Crown mentioned as the symbol of authority against which offences were committed. The meaning and effect of this expression has already been discussed. Palgrave appears to pay little attention here to civil actions where the participation of the nation and of the citizen was greater. Chief Baron Gilbert points out that the King had more to do with criminal justice on account of its close connection with the preservation of the peace.³ Gneist speaks of the control of the King (*Scil.*, Executive) when royal (*Scil.*, State) interests were at stake. Stubbs declares that the constructive work of Henry II. laid the foundation of royal autocracy, and of the national organisation which overpowered it in the end. This at least appears certain, therefore, that the Monarch had no clear mandate for his

¹ Palgrave, *King's Council*, 10.² *Ibid.*³ *Court of Exchequer*, 8, 9.

personal authority for any length of time. The communal order prolonged its existence into the period during which the royal authority was being set up, and before the former had really passed away the latter had commenced to be a national organisation. The true juridical position in the "King's" Courts we learn from Sir Frederick Pollock and Professor Maitland. "The judgment was given by the unanimous consent of the whole Court. Short of proclaiming his will to be the judgment of his court, there was little that he could or would not do by way of controlling all the justice that was done in his name." This statement reveals the fact that the judicial function was not a royal but a substantive State function, even in the great and royal days of Henry II. By the time of Edward I. England had a State Executive, which supervised the administration of justice by judges who possessed a substantive authority conferred upon them not by the King alone but by the King and Council. Gilbert¹ declared that the administration of justice in the King's Bench had no control but the prerogative of mercy.

The King, therefore, could not interfere with the adjudication, but he might exercise the executive office of pardon in a proper case. In Britton² the distribution of justice is alluded to—"With regard to ourselves and our Court, we have ordained that inasmuch as we are not sufficient in our own proper person to hear and determine all the complaints of our people we have distributed our charge in several portions as is here ordained."

The words "and our Court" provide the necessary admission of the necessity for co-operation in making rules relating to the administration of justice. Then follows a distribution of powers. The King *wills*, &c. This word "wills" is the same word used by Cnut in his secular ordinance in which the counsel of the Witan is mentioned.

¹ Court of Exchequer.

² Nicholls, pp. 2, *seq.*

The King's "will" was sometimes introduced to supply the executive portion of the legislative act. In some instances the King completes the legislative act by saying that he commands, &c. The concurrence of the Witan however, is generally in evidence somewhere in the enactment, though why such a mild idea as "concurrence" should be mentioned could perhaps be more easily ascertained on reference to the ecclesiastics who drafted our early laws than by consulting the views of the great nobles who comprised the membership of our early Councils. "Will" and "command" have now given place to "enact."

Nothing is clearer than the fact that in legislative and administrative acts the deliberative and executive are usually found supplementing one another. Some intervention of the latter is usually necessary to render the former effective. In Bracton¹ the peace of the viscount is mentioned in such terms as seems to suggest that the peace duties involved a corresponding judicial power. "If only the peace of the viscount be at stake . . . the viscount may hold several pleas which do not belong to his office, but in the King's place, if this be specially deputed to him, &c.

It is not surprising that the purely executive functions should have become interwoven with the judicial, for they both issued out of the King's Court, or national council with the King as President. The judicial in its own department is superior to the Executive, for the judges of the High Court may in certain cases overrule the objections of executive officers to the production of State documents as evidence.²

Reference has been made to the intervention of the King in legislation as the representative of the Executive. The writer further suggests that the King intervened in judicial work on the same principle; that in fact he chiefly inter-

¹ Bk. ii., ch. 25.

² See *Marks v. Beyfus* [1890], 25 Q. B.D. 494.

vened when the rights of the Executive were threatened. He was not the judge who tried the case. It was the whole *Curia*, or the judicial members of it, who sat in judgment. Nor is this in the least surprising, for adjudication was an important administrative act in those early days when laws were few and more elemental, and the great interstices in their provisions were frequently filled in by *decreta* and judicial decisions. There is therefore ample support for the contention that the King was not judge, but (1) presiding officer and (2) guardian of the State rights against possible encroachments by the individual who came as a suitor before the Witan or *Curia*. The interests of the State were to be preferred to the claims of the individual.

The artificiality and the mature wisdom of this rule, which has existed in England in a rudimentary form since very early times, suggests that it was borrowed from some highly developed system of jurisprudence—probably that of Rome. It is an eminently debateable question whether at the present day the prerogatives of the Crown should not be more openly defined, and the sway which this vague and uncertain rule holds in the courts subjected to some limitation.

A suitor to-day may be a municipal body which has the welfare of millions of individuals entrusted to its care, or a trade society of national dimensions with incalculable human interests within its keeping. Against these a single State official may be led by his own indiscretion or by an excessive regard for his *amour propre* into a course of action which may inflict great injustice or hardship, simply by pleading some obscure prerogative that may be unrecorded except in remote official archives and may be unknown and even undiscoverable to the general public.

There is perhaps to-day a good deal of uncertainty as to the meaning of the expressions "administrative" and "ministerial," as applied to acts of government. The

latter is an act involving a minimum of discretionary power (in theory none), whilst the former is the exercise of discretion, accompanied (in practice), it may be, by a modicum of overt action. Not only the creation of jurisdictions, but also the dispensation of justice was an administrative act, for it involved not simply acts of performance, but also exercises of the discretion.

From this fact we can see that the administration of justice in the abstract is not an executive duty but a discretionary function. It was perhaps more closely associated with the legislative function than with the executive.

Sir Matthew Hale's views of the functions of a judge have already been given. This learned judge stated the matter in somewhat too liberal terms, but other weighty statements of a somewhat similar character may be found in our legal works. In Thorpe¹ the King wills that just laws be established and every unjust law carefully suppressed. The Witan itself, which legislated, also judged. It would exercise great freedom in giving judgment. It is therefore easy to understand how it came about that the judicial duties passed to the legal members of the *Curia*, as the successors to the Witan, in a somewhat vague and extensive form. We are plainly told in the books that judges could set aside an assize if they found it impossible to administer it.² The fact that legislation and justice flowed from the same authority also enables us to perceive how it was that the King alone could not truly be said to be the dispenser of justice, for the deliberative function, was a function for the many to exercise; nor is this constitutional principle effectively displaced by the fact that the King was more intimately associated with trials which dealt with breaches of the King's peace and suits in which the interests of the Executive were involved. Mr. Pike³ says that the *Curia Regis* was not only undistin-

¹ p. 1

² Stubbs C. H., i., 616.

³ House of Lords, p. 26.

guishable from the *Commune Consilium*, but that it was also a court in the legal sense of a court of justice. From the *Curia* the duties passed to the justices as substantive officials, whose duties were prescribed by King and Council. The judges, we read, might improve the law, but could not change it.¹ It is not therefore too great a presumption to contend that the King in early times was neither the fountain nor was he alone the dispenser of justice, but that the function was a co-operative one. The co-operation became more pronounced, and the King's participation less and less as time went on, until Edward IV. attended court simply in order to see how justice was administered. Both Fortescue and Sir Edward Coke declare that the King must not judge in person.² A more serious piece of evidence in support of the notion that the administration of justice in the twelfth and thirteenth centuries was not the sole prerogative of the King occurs in connection with the doubt, then by no means extinct, whether the King himself could not be brought to judgment. Sir Frederick Pollock and Professor Maitland³ discuss the question whether the King himself could at this time be judged according to law. If so, there must have been a co-operative judiciary of the most pronounced type. The learned authors, after considering the various authorities bearing upon this question, come to the conclusion that "a more acceptable solution, especially when the Palatine courts had died out, is that the incorporate realm represented by the baronage may judge the King in his own court if the worst come to the worst."

In point of fact Edward II. and Richard II. were arraigned and tried by informal tribunals for constitutional delinquencies, indicating most clearly that there was in early times extraordinary authority and latent power in the constitution to call even the King to account for his conduct.⁴

¹ Bract., i., ch. 2; s. 6. ² De Laudibus Legum Angliæ, 22, 23ⁿ. ³ P. & M., i., 182, 516.

⁴ *Ibid.*, i., p. 182.

This particular idea has been effectually eliminated at least from our legal system,¹ and it is no longer a recognised rule of the Constitution, but it throws some light upon the principles and *personnel* of the early judiciary.

Judicial functions have long been detached from creative work in theory, for judges are now said only to declare the law, and not to develop it. Even the functions of the King in Council in Parliament, which are now exercised by the House of Lords, are in the same way treated as adjudicatory only.

The uncontrolled administration of the revenues of the Crown and the disposal of Crown property has never belonged solely to the King. The function is not a purely executory one, as proprietary interest has a great deal to do with the matter. We have already directed attention to the participation of the Witan in these duties.

In Domesday Book and Beyond (p. 167) Maitland distinguishes between manors which belonged to the kingdom or kingship, the *regnum* or *regis* and private manors of the King.² The notion of official property was well understood in those times, for it was sometimes held by earls in addition to their private property.³ When a new King was elected it was he and not the heir of the old King who stepped into the official lands of the King.⁴

"It was considered," says Professor Vinogradoff, "that the main stock of Crown estates ought not to be alienated at all; they are sometimes described as belonging not to the King but to the Kingdom (*Regnum*).⁵ Again,⁶ "the absence of hidage does not belong to all the royal estates, but only to the ancient *Crown* possessions." As there was much land which belonged to the Crown, or to what we should now term the "State," it is easy to believe that the

¹ *Ibid.*, I., 516.

Ibid., p. 254.

³ *Ibid.*, 168.

⁴ *Ibid.*, 253, 254.

⁵ See English Society in the Eleventh Century, p. 326.

⁶ *Ibid.*, p. 327.

Witan did not leave its sole administration to the King. The case is *res ipsa loquitur*, and the burden of proof is on those who urge the contrary view.

When discussing, in the year 1873, the origin and meaning of the expression 'Crown,' Maitland said that the King's land and the Crown land and the King's money and the national treasure are not separated in contemplation of law.¹

It is unfortunately true that no scientific attempt was made to distinguish between the two in mediæval times, and no legal rules were laid down for discriminating upon the subject, but there are facts which suggest that the two were by no means identical, though for some time after the Conquest all lands were treated as the property of the King in right of his Crown, owing to the King's feudal status as owner of all the land in the kingdom. We also know that Edward III. distinguished in his will between Crown property and his own private property. Crown property was frequently held to be beyond the reach of the action of the reigning King, for we read of numerous cases in which grants of land made by Kings were revoked, and also of restrictions placed upon the Monarch's power of disposing of it. This suggests that these lands belonged to the nation and were only to be administered by a duly constituted Crown authority, which exceeded the boundaries of the Monarch's will and discretion. Fortescue, speaking of the King's ordinary revenues, declares that it is his duty to pay his ordinary expenses, *e.g.*, household expenses, wages of his great officers of State, councillors, &c., out of them. This indication that the King must support the State officers, &c., suggests that the Executive was wider than the King. Any surplus after duly making all such payments is taken by the King to do with as he pleases.² Any misapplication of the moneys which the King receives

¹ 17 L. Q. R., at 136.

² Monarchy, p. 54.

for the maintenance of his office, for the support of the dignity of the Crown, is described not as power but as impotence.¹ The idea of impotence apparently means inability to perform the duties of the Crown. Fortescue declares that the King may not sell his land as it would be to the hurt of his realm.² In Gilbert³ we read "Exchequer which was the court for the private concerns of the Crown, and therein matters of Common Revenue were first despatched." Gilbert distinguishes between lands mentioned in the Domesday Book from which the revenues of the Exchequer came, which were called *Terræ Regis*, i.e., lands granted out by the King and lands held not for the King's provision but for his defence *semble* for the defence of the country.¹

Staundford,⁵ speaking of lands being holden of the King, observes the well understood distinction between those held of the ancientness of the Crown and the King's new escheats. Bracton recognises two kinds of Crown property, that which belongs to the public treasury, which is *quasi Sacra*; such property is of too sacred a nature to be given from one to another. Such possessions *faciunt ipsam coronam et Communem utilitatem respiciene sicut est pax et justitia*. On the other hand there are things which appertain to the Crown on account of the King's privilege, and so do not regard the common good. Such things, e.g., treasure trove, royal fish, &c., may be transferred by the King. Likewise concerning things and liberties and dignities which appertain to the dignity of the King and to the Crown.⁶ In Scutage there was an element of royal and national taxation.⁷ Subsidies were still more national in their character.

In modern times the administration of Crown lands, and *a fortiori* of taxation derived from personal property, has become increasingly a legislative question. This tendency,

¹ Monarchy, p. 39. ² *Ibid.*, p. 77.

⁵ De Prerogativa Regis, f. 10.

³ Court of Exchequer, p. 5.

⁶ Bk. ii., ch. 5, s. 7.

⁴ *Ibid.*, pp. 11., 15.

⁷ P. & M., i., 274.

if it may be regarded as a development of inherent principles, affords in itself evidence of the fact that proprietary matters always have contained elements which distinguish them from purely executive concerns, and therefore that the King alone was not entitled to deal with them save in counsel with other representatives of the nation. The course of executive matters has continued much as it was before the sixteenth century, namely, as a purely Crown function, except that it has come more completely under the control of Parliament. The administration of justice has likewise come under national control, and the juridical portion of it appears almost to have fallen into line with the executive function. The heads of the great offices of State are administrators, when sitting in Council, and executive officers when doing their departmental work. The Creative body, Parliament, *i.e.*, the people at large, have now, directly or indirectly, gained complete control over the three elemental functions of government.

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